Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation;
KATHI BAILEY, a married person;
LILLIAN YOUNG, a married person;
TONI STRAUCH, a married person; and
ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978;
Appellants,

v.

THE SEATTLE TIMES,
a Delaware Corporation,
d/b/a The Seattle Times;
WALLA WALLA UNION-BULLETIN, INC.;
ERIK LACITIS and JANE DOE LACITIS;
JOHN WILSON and REBECCA KAREN WILSON;
JOHN McCOY and KAREN McCOY;
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

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ISSUES PRESENTED FOR REVIEW

1. Is it a denial of equal protection for the State Court to deny a jury trial on the issue of reasonable attorney's fees awarded by the court when other litigants contesting attorneys fees have the right under State Law to a jury? Yes.

2. Does the State Court's denial of all discovery, prior to summarily awarding fees violate principles of equal protection and due process? Yes.

PARTIES TO THE PROCEEDING

All parties are fully set forth in the caption of this matter, produced on the cover of this petition.

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IN THE

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KEITH MILTON RHINEHART,
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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

THESE ARE SET FORTH IN APPENDIX A and include State of Washington, Court of Appeals, Division I cause # 23526-5-I: opinion of the court and remand to trial court,

August 13, 1990; Order denying motion for reconsideration dated September 27, 1990; Order affirming trial court on remand, dated May 3, 1993; Order denying motion for reconsideration of affirmance on remand, dated June 9, 1993, and Supreme Court of the State of Washington, Case # 60732-0, Denial of Petition for Review, dated December 1, 1994.

GROUNDS UPON WHICH JURISDICTION OF U.S. SUPREME COURT JURISDICTION INVOKED

This case seeks review of a King County Superior Court case # 80-2-02460-4 decision dated January 9, 1989 (set forth in part in Appendix D (3)), which was timely appealed to the State of Washington Court of Appeals, Division I, in Case # 23526-5-I, and timely petitioned for review to the Washington State Supreme Court in case # 60732-0, denied on December 1, 1994. (Appendix A)

Jurisdiction is conferred upon this court by 28 USC 2101 (c), and 28 USC 1257.

CONSTITUTIONAL , STATUTORY, AND COURT RULES

United States Constitution, Amendments 1 and 14. (Appendix C (1)).

Washington State Constitution, Article 1, Section 21. (Appendix C (2)).

Revised Code of Washington, 4.84.185. (Appendix C (3)).

Superior Court for the State of Washington Civil Rules 26, and 38 selected portions. (Appendix C (4)).

STATEMENT OF THE CASE

I. Statement of Facts.

The Petitioners, a minoritarian spiritualist church, its spiritual leader, and representative members, filed this case for defamation and invasion of the right to privacy against News Media Respondents in 1980 for publication of a series of defamatory, untrue articles. The Media Respondents depicted Petitioners as a bizarre, mind-controlling cult that bilked its members out of personal funds and property. Members of Aquarian Foundation experienced ostracism and violence as a result of the defamatory articles published by Respondents. These acts of violence were documented in the original action, and constituted cause for the trial court to issue a protective order to prevent the news media from publishing membership information obtained through discovery. (June 26, 1981, King County Docket # 80-2-02460-4). The trial court ordered discovery of the membership information, subject to the protective order. After an interlocutory appeal by the News Media, this Court upheld this State Trial Court Order in ***Seattle Times Co. v. Rhinehart*, 467 U.S. 20,104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).** This Court denied acceptance of certiorari of the issue of whether the state court may order disclosure of member identities in discovery. ***Rhinehart v. Seattle Times*, 467 U.S. 1230, 104 S. Ct. 2690, 81 L. Ed. 2d 884 (1984).** That order had been upheld by the State of Washington Supreme Court in ***Rhinehart v. Seattle Times*, 98 Wash. 2d. 226, 654 P.2d 673 (1982).** (See Appendix B (2) for text of that opinion regarding the discovery issue.) All parties thoroughly briefed the issue of the right to discover membership identities in this first appeal.

The case was then remanded to King County Superior Court, and the trial judge, the Honorable James J. Dore, ordered Aquarian Foundation to comply with the discovery order. SCP 1660-1740, 1822-23. Petitioners did not reveal membership lists in their discovery supplements.

In October of 1986, Respondents moved to dismiss for failure to comply with the 1981 discovery order. CP 171-73.

In January of 1987, King County Superior Court entered two (2) orders of dismissal—one for failure to produce membership lists, and one for failure to produce videotapes (which tapes included the recognizable images of members.). CP 1-29.

On May 31, 1988, the Washington State Court of Appeals, acknowledged some of the issues had not been waived, accepted the Seattle Times' argument that most of the issues were previously brought, and affirmed the dismissal orders, finding the appeal frivolous, and remanded to the trial court for a determination of the amount of reasonable attorney's fees. ***Rhinehart v. Seattle Times Co.*, 51 Wn.App. 561, 754 P.2d 1243, *review den.*, 111 Wn.2d 1025 (1988), *cert. den.*, 109 S.Ct. 1736, __ U.S. __, 104 L.Ed.2d 174 (1989).** (Appendix B (1)).

The basis for ruling the appeal was frivolous and awarding attorney's fees was because this matter had previously been presented by Petitioner's former counsel. See Brief of Appellants No. 1054-3-I. Respondents already had substantially completed the legal work to respond to the appeal and they presented substantially the same issues that had been presented in the former appeal. Division I, No. 23526-5-I.

On June 20, 1988, Aquarian Foundation moved for reconsideration; the Court of Appeals denied reconsideration on August 1, 1988. J.S. App. at 43.

On August 31, 1988, Aquarian Foundation sought review with the Washington State Supreme Court; review was denied on November 29, 1988. J.S. App. at 44.

The trial court summarily granted Respondent's total amount of attorney's fees requested, in the amount of $64,752.02. CP 158-159; 164; RP 22-23. (Appendix D (3)). Petitioner appealed the award of attorney's fees on the ground, inter alia, that the trial court refused petitioners a jury as demanded, refused to grant any discovery to petitioners, and made an unconsidered, summary determination of the amount of attorney's fees, without reviewing the record or evidence. CP 165-66. The State Court of Appeals ruled for Petitioners on one point, specifically holding that **"[b]y summarily awarding the attorney fee to the Respondents the court abused its discretion."** (Appendix A (1)). The Court of Appeals remanded the case back to the Superior Court, and Judge Dore, for findings of fact and conclusions of law, and for the trial judge to hold additional proceedings or take additional evidence, if appropriate. *Id.* at 23526-5-I/9.

On August 28-29, 1990 Petitioner's attorney had Notices of Depositions and Subpoena Duces Tecum personally served upon Respondents' attorneys. The depositions were scheduled on September 6, 1990. On September 5, 1990 Respondents' attorneys filed their objections to the subpoenas. On September 6, 1990 Respondents' attorneys refused to appear in response to their subpoenas. See Statement of Jean Schiedler-Brown, September 6, 1990. On that same day, Petitioner's attorney requested a ruling from Judge Dore on whether or not the deposition would continue. *Id.* at 2. Without allowing argument in person by counsel and without allowing a record to be made the Judge ruled that no discovery would be allowed prior to the hearing Monday (September 10, 1990) in which findings of fact and conclusions of law to support his award of attorney fees would be made. *Id.* at 3.

At the hearing held on September 10, 1990, Petitioner's attorney objected to having been prevented from presenting response findings because of being unable to conduct discovery in this matter. See Court Report 9-10-90 at page 3. Petitioner's attorney did not refuse to cross examine counsel but objected to that being the appropriate remedy and inadequate for discovery needs. *Id.* at page 4. In any event, after brief argument, the Court did not provide for the calling of any factual witnesses. *Id.*

Judge Dore, without comment, again summarily awarded the same unconscionable amount of attorney's fees by simply signing findings of facts submitted by Respondents. *Id.* at 23526-5-I/3.

The State Court of Appeals then upheld the order of fees, because the order recited factors consistent with State Law for findings on fee awards. (Docket # 23526-5-I, May 3, 1993.)

FEDERAL QUESTIONS TIMELY RAISED

The issues herein were timely raised and preserved before the Court of Appeals and the Trial Court. (Appendix D.) The trial court specifically denied the relief requested (Appendix D (3)). The Court of Appeals addressed issues of State law and abuse of discretion and did not analyze the federal questions, except to comment that the Equal Protection argument regarding a right to jury trial was "vague and unsupported by citation of authority and need not be considered." (Appendix A (1)). Upon remand to the trial court, the discovery objections were again renewed. All issues were raised in the Petition for Review to the State Supreme Court, case # 60732-0.

ARGUMENT

THE ISSUES SET FORTH IN THIS PETITION ARE IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

When a court imposes "reasonable attorneys fees" against a litigant, the litigant becomes responsible to pay his opponent's attorneys fees. If his opponent had received a fee billing from his own attorney, he would have the right to object to the bill; he would not be legally required to pay the bill unless his attorney proved the fee amount in an impartial forum, complete with the right to a jury trial, the automatic right to reasonable discovery, and the right to an impartial presentation of evidence.

But according to the Washington court's decision in this case, a litigant found responsible for opposing counsel's fees has no jury trial right, no right to discovery, and no right to present evidence in an impartial forum. Rather, the trial judge may accept opposing counsel's fee claim on its face, without examining one iota of opposing counsel's work product, and may sign an order prepared by opposing counsel that recites that opposing counsel acted with due skill. In one stroke of a pen, the trial judge may summarily order more than $64,000, without regard for evidence and procedures.

The issues herein are ripe for review because the litigant, at the mercy of the claims of adverse counsel, is deprived of all basic procedural safeguards. There is no articulable State policy to justify this differentiation in treatment; the incentive for opposing counsel to inflate the billings is increased because he has had an adversary relationship with the person who will now pay his bill.

There are a few lower court decisions that touch on the issue of the right to jury trials and/or procedures collateral to the

imposition of reasonable attorneys fees as part of a court's authority in making an award to a prevailing party. ***Allard v. Pacific National Bank*, 99 Wn. 2d 394, 663 P.2d 104 (1983); *Donaldson v. Clark*, 819 F. 2d 1551 (11th Cir. 1987).**

However, these decisions are based upon an archaic consideration of the common law right to jury trial embodied in the 7th amendment to the U.S. Constitution, and a fictional categorization of the proceeding as "equitable" as opposed to "legal" in nature.

These cases completely miss the point of impact on litigants of court rules and statutes established across the nation and increasingly interpreted to award amounts that reflect "reasonable attorneys fees" to prevailing litigants. The number of cases in which such awards are made were virtually sparse and nonexistent 10 years ago, but are mushrooming and are the subject of considerable controversy today.

The variability of fee awards is now the subject of scholarly study, and of peak interest to State and Federal Bar associations. See, for example, **Otorowski, *Civility and Rule 11*, Washington State Bar News, Vol. 47 No. 5, May 1993, at 24.** The Otorowski study of fee awards for the past several years in Federal courts shows that for the 9th circuit, only 3.8% of awards have been "large," that is, in excess of $25,000.00. Now, in this case, the Washington courts have *summarily* awarded over $64,000.00 against a minoritarian religion.

The fee award laws and rules, all developed long after the Constitutional provisions regarding jury trials, were designed to discourage court congestion; without an administrative process that includes equality and due process, they now present a risk for the litigant who brings a politically unpopular case, or a case that challenges the weight of authority.

1. Should The Court Review The Issue Of Violation Of Equal Protection By The Trial Court In Failing To Allow A Jury Trial On The Issue Of The Amount Of Reasonable Attorney's Fees? Yes.

A. Equal Protection.

The Equal Protection clause is violated when similarly situated people are irrationally treated differently. ***Silva v. Vowell*, 621 F.2d 640, *reh. den.*, 625 F.2d 1016, *cert. den.*, 101 S.Ct. 941, 449 U.S. 1125, 67 L.Ed.2d 111 (1980).**

In this case, the issue is whether Aquarian Foundation has a right to a jury to determine the pivotal fact: what are reasonable attorneys fees incurred on appeal? This is purely a factual determination, and the process for determining a debt owed is identical as for countless other cases in which a jury is guaranteed by the U.S. and State Constitutions. This right is also guaranteed by CR 38 to a class of litigants that existed at the time the constitution was established. No matter how small the dispute, any party who owes or against whom attorneys fees are claimed, has an absolute right under these provisions to have the matter determined by a jury, **except under the current State court decision which artificially puts petitioners in a category of litigants who do not have these rights, because the court's historical authority for awarding sanctions has been viewed as "equitable" in nature. The categorization of "equitable" is a mere fiction, in that, the process, evidence, standards, and other processes to reach a determination of "reasonable fees" is the same in both types of actions.**

Thus, the Court of Appeals held below that a jury trial right was not implicated because the attorney's fees imposition was made pursuant to the inherent power of the court and the Rules of Appellate Procedure. Court of Appeals Decision, No. 23526-5-I/5. (Appendix A (1)). The court's analysis followed the flawed reasoning of traditional cases, when it stated: **"[A] party**

has a right to a jury trial when a legal cause of action is alleged." *Id.* at 5, quoting ***Allard v. Pacific Nat'l Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983)**; Article 1, Section 21 of Washington State Constitution. Although the court also noted that RCW 4.84*et. seq.* expressly provides that the determination of fees is to be made in the trial court, the court failed to apply principles of equal protection to the class of litigants who must litigate fees assessed in this manner. Court of Appeals Decision, 23526-5-I/5. The issue was remanded to the trial court, but no trial process was allowed. There is no reason to prejudice this class of litigants by depriving them of a jury, and forcing them to accept fees imposed by the judge who originally ruled against them.

RCW 4.48 *et. seq.* is silent as to any express State policy interest for refusing a jury. There is no articulated State policy to justify this deprivation. Action on moneys owed is traditionally an action for which a jury trial is guaranteed. See ***In Re Lamb*, 29 BR 950 (Bankrtcy. 1983),** where there was a factual issue on a debt and the right to a jury was acknowledged. This case embodies a violation of equal protection of the laws for petitioner's class of litigant that is blatant, direct, and likely to continue to exist unless this court resolves the issue for similarly situated litigants who may owe attorneys fees.

This class of litigants have a stronger reason to request a jury for determining reasonable attorney's fees than other litigants in monetary disputes. There is potential for abuse and for lack of objectivity if a judge - who has ruled against the party in the first place - has sole authority to award fees. The award must be reasonable, per statute, and not punitive.

Here, the judge awarded tens of thousands of dollars by the stroke of a pen in a court without an adversary process because only one party's factual position was allowed to be presented.

A jury would have supplied fact finders to review the evidence, weigh the burden of proof required of the attorneys requesting fees, and consider the merits of the fee request, *independently from the court's prior finding that the case was frivolous.*

These safeguards weigh decisively *against* distinguishing litigants against whom terms have been imposed from other litigants. The purpose of the Equal Protection clause is well stated in ***Cleveland Bd. of Ed. v. La Fleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d. 52 (Ohio, 1974),** which holds that this clause is designed to protect fragile values of a vulnerable citizenry from overbearing concern for efficiency and efficacy.

In this case, the State Court gave no logical reason for denying the right to a jury trial on the issue of attorney's fees. The court tacitly followed the archaic and fictitious theory that somehow this class of litigants are deprived through a theory of "equity." This argument makes sense only when analyzing the issue under the 7th amendment. Petitioner's position is not relying upon the 7th Amendment, and this argument of "equity" merely begs the question of procedural fairness and regularity under the 14th amendment Equal Protection Clause.

This issue conflicts directly in principle with case-law interpreting the right to equal protection--the right to similar treatment without discrimination as to class. It is a genuine issue of first impression that requires guidance from the U.S. Supreme Court so that substantial fee awards are resolved in an orderly and fair fashion.

2. Should The Court Review The Denial Of All Discovery By The Trial Court, Which Summarily Awarded Fees? Yes.

A. The trial court's refusal to allow discovery violated the Petitioner's right to equal protection of the laws.

Denial of discovery presents a complete deprivation of equal protection of the laws under the 14th Amendment of the United States Constitution. A State violates the equal protection clause when it irrationally treats different classes of individuals that are similarly situated. See ***Silva v. Vowell,*** **supra.**

Except for litigants in the shoes of petitioners, *Any* litigant in *any* case involving disputed attorney's fees in Washington State Superior Court has, under the Rules of Civil Procedure, CR 26 et. seq., (Appendix C (4) (a)), an automatic right to discovery, without leave of court.

In the case at bar, terms were imposed at the end of a case, and the case was summarily noted for disposition by opposing counsel, in whose interest it was to provide no discovery to Aquarian Foundation. Therefore, in addition to being deprived of a basic procedural safeguard, an impartial jury as a fact finder, Petitioner was deprived of all evidence except the information that opposing counsel chose to disclose to the court. While being made liable for tens of thousands of dollars in fees, Petitioners had no opportunity to discover and review evidence that was in the sole control of opposing counsel. Similarly to the Equal Protection criteria examined above, the Supreme Court must review the serious consequences of depriving litigants such as Aquarian Foundation from a meaningful day in court.

There is no express or logical state policy for denying discovery to these litigants. Only discovery can uncover abuses and insure a fair, balanced process for determining fees. Fee data is peculiarly within the knowledge of the attorney's claim-

ing fees--the same persons with the greatest incentive to inflate their fees. All of the reasons, purposes, and uses for discovery exist for this class of litigants as for any litigants engaged in a monetary dispute. It is a violation of Equal Protection of the Laws under the 14th Amendment of the U.S. Constitution to deny discovery that for other litigants, for the same genre of issues, is a matter of right.

B. The trial court's refusal to allow discovery also constitutes a denial of Petitioner's right to due process of law, and should be reviewed by the United States Supreme Court.

In general, under Washington Court rules, which are similar in form and content to the Federal rules of Civil Procedure, parties are permitted broad "discovery regarding any matter, not privileged, which is relevant to the subject matter involved" in the lawsuit. ***State v. Hamilton*, 24 Wn.App. 927, 604 P.2d 1088, 1012 (1979); Cr 26(b)(1).** The trial judge possesses a broad discretion to manage discovery in a fashion that will implement the philosophy of disclosure of relevant information. *Hamilton* at 1013. In order to enhance the search for truth, trial courts are encouraged to exercise their discretion to permit discovery. ***State v. Mecca Twin Theater & Film Exchange, Inc.*, 82 Wn.2d 87, 507 P.2d 1165, 1167 (1973).**

In ***Bramall v. Wales*, 29 Wn.App. 390, 628 P.2d 511 (1981),** after a continuance was denied it was held that the trial court abused its discretion when good cause for a continuance existed. Improper curtailment of discovery requires reversal when the curtailment is prejudicial. See ***State v. Hamilton*, supra.** Thus, most litigants in the State of Washington enjoy basic, automatic, and enforceable rights to reasonable discovery.

In this case, counsel attempted to utilize the Civil rules to obtain reasonable discovery without leave of court, and the trial

court allowed opposing counsel to openly refuse to respond to properly issued process. Aquarian Foundation was precluded from all discovery on the sole, dispositive issue of reasonableness of the fee request.

Due process is to be determined depending on the importance of the interest involved and the nature of the subsequent proceeding. ***Bodie v. Connecticut*, 91 S.Ct. 507, 400 U.S. 433, 27 L.Ed.2d. 515 (1971).** In this case, a significant property interest in more than $64,000.00 in fees was at stake, and the person claiming the fees was counsel adverse to Aquarian Foundation. The proceeding that occurred fell far short of adversary, when petitioners were denied a jury, were denied discovery, and were denied an evidentiary hearing that would have allowed them to reasonably present a defense.

The facts support the probability that Aquarian Foundation was severely prejudiced by lack of due process. A claim for over $60,000.00 in fees for a case that was substantially litigated in a prior appeal by the same counsel is suspect on its face. The fee request abounded *ad nauseam* repetitious billings for file reviews and double-billed time for meetings between counsel. These factors - review time, billing for double counsel, and presenting incomplete itemization of services, have all been established as reasons to reduce fee requests. ***Seltzer v. Chadwick*, 26 Wn.2d 297, 173 P.2d 991 (1946).** The Court of Appeals decision ordering remand for findings and conclusions noted that some duplication by attorneys existed on the face of the Seattle Times' fee request. #23526-5-I, opinion 8/13/90, at 8. (Appendix A (1)). Petitioners were prejudiced by being deprived of discovery and therefore were not afforded meaningful due process.

Procedural due process requires at a minimum notice and an opportunity to be heard by an unbiased tribunal. The ***Mathews v. Eldridge*, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d. 18 (1976),** balancing test is employed to determine when and

how formal a hearing must be. The importance of the interest involved and risk of erroneous deprivation is weighed against the cost, burden, and availability of additional safeguards. Here, a severe economic burden, which is "punitive" and not "reasonable" in amount, is being placed upon a minoritarian church. The risk of erroneous deprivation could easily be avoided by allowing discovery depositions and a meaningful hearing on the reasonableness of attorney's fees, and an unbiased fact finder. The cost and limited burden of allowing the discovery requested does not outweigh Petitioner's risk of deprivation of property without due process. Under ***Mathews v. Eldridge,*** Petitioner was not afforded sufficient procedural due process, and Petitioner was deprived of the minimum due process that was provided as a matter of right to other litigants under State court rules. This violation of established principles of Constitutional law warrants review by the U.S. Supreme Court.

This matter should also be reviewed because it is a matter of first impression regarding the due process rights of litigants who must litigate the issue of "reasonable" fees imposed by a court. These will be issues of growing concern in the future as that legislation is used increasingly to award fees in order to manage congested court dockets. It is essential that there be a resolution of this issue at the national level because it affects the basic rights of all litigants.

In this case it is particularly problematic that the petitioner is a religion, and that the case involved resolution of assertion of constitutional rights. That the State Court trial judge signed orders without comment, summarily denied discovery, and signed counsel's proposed "boiler plate" order setting Seattle Times attorney's fees punctuate the extent of deprivation of process that is possible when the courts ignore application of the 14th amendment to litigants in the position of Aquarian Foundation.

In this case, there was *de minimis* argument allowed on the record, no taking of evidence other than to indicate that a fee affidavit was on file, and no inquiry by the court as to how the attorneys managed to expend over $64,000.00 in fees on a claim that had been previously appealed and briefed to the U.S. Supreme Court, (for which fees were not awarded) and which the court HAD RULED was duplicative. An attorney working at the rate of $150.00 per hour would have to spend 2½ solid months responding to this "frivolous and without merit" claim, to accrue such fees. This, with a brief on virtually all of the relevant arguments already on a computer memory!

In the case at bar, Aquarian Foundation's attorney asserted that Seattle Times attorney claimed unproductive time and duplicitous time reviewing pleadings. There was no chance to examine counsel to verify the exact meaning of time entries; to verify the experience and education of the relevant attorneys; to share this information with any potential expert who could testify on behalf of Aquarian Foundation; to otherwise prepare. Decisively, some of the services claimed by Seattle Times attorneys were not directly involved with the litigation. The Court of Appeals of the State of Washington initially agreed with these concerns, but failed to order any process by which to supplement the court's findings. (Appendix A (1)). Therefore, the opposing party's attorneys were given a windfall. Furthermore, the trial court was openly unfair and Aquarian Foundation was severely prejudiced because the circumstances in this case clearly indicate that the fees awarded were excessive, duplicative, and manifestly unreasonable. The amount awarded is statistically far beyond the bounds of similar awards in other cases, and the amount in excess of $64,000 would cause any reasonable person to question how an attorney managed to justify such amounts defending a "frivolous claim utterly without merit."

Here, the News Media attorneys caused their own client, a major newspaper to interview themselves after the Court of

Appeals first ordered the fees to be determined. (by Opinion, at Appendix B (2). Media counsel was quoted as having incurred "over $38,000" in fees. (Seattle Times article dated June 2, 1988). Incredulously, after the appellate court awarded fees, Seattle Times attorney's claim for fees almost doubled, so that the fee affidavit filed December 16, 1988 claimed $64,752.02.

In this case, every procedural safeguard that might have prevented the radically excessive fee award was denied.

CONCLUSION

The issues presented are of first impression and of timely constitutional magnitude. The United States Supreme court should review these serious and timely issues *consistently with the criteria set forth in Supreme Court Rules, 10.1 (c).*

Submitted this 24th day of February, 1994.

JEAN SCHIEDLER-BROWN
Attorney of Record for Petitioners
LAW OFFICES OF
JEAN SCHIEDLER-BROWN
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606 Post Ave., Suite 101
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APPENDIX A

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.
s/COLEMAN, C.J.
CHIEF JUDGE

FILED
AUG 13 1993
IN CLERKS OFFICE
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; LILLIAN YOUNG, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Appellants,

KATHI BAILEY, a married person; TONI STRAUCH, a married person; and SYLVIA CORWIN,

Plaintiffs,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Respondents.

No. 23526-5-I

DIVISION ONE

FILED:
AUG 13 1990

GROSSE, A.C.J. — On May 31, 1988, this court affirmed the judgment of the superior court dismissing the appellants' action for defamation and invasion of privacy and

further awarded the respondents terms for a frivolous appeal. This court remanded the case for a determination of the attorney's fees. This appeal is the result of the hearing before the trial court on the determination of those fees.

This is a defamation action dismissed by the trial court in January of 1987 because appellants refused to comply with the trial court's discovery orders. This court affirmed the dismissal on May 31, 1988, and ruled that appellants' appeal was frivolous. The opinion remanded the case to the trial court to determine the amount of attorney's fees and expenses to be awarded to the respondents pursuant to RAP 18.7, CR 11 and RAP 18.9(a). *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 754 P.2d 1243, *review denied*, 111 Wn.2d 1025 (1988), *cert. denied*, __ U.S. __, 104 L. Ed. 2d 174, 109 S. Ct. 1736 (1989). This court issued a mandate remanding the case for a determination of the fees and expenses.

Respondents moved for the entry of judgment, providing detailed fee affidavits describing the tasks performed and listing the fees and the expenses. In response, appellants filed an affidavit of prejudice against the trial judge who had heard the case initially. Second, appellants asked for a continuance to pursue discovery to provide greater detail on the correlation between the time billed and the time actually spent performing necessary legal tasks. Third, appellants filed a jury demand and argued that the amount of sanctions must be determined by a jury. Additionally, appellants asked for a stay of enforcement of the judgment awarding attorney fee's and costs pending a United States Supreme Court review.[1]

At the hearing on the attorney's fees, the trial court heard the other motions first and denied them. Thereafter, the trial judge looked over the affidavit of counsel for the respondents

[1] Although confusing, the record contains documents showing that a commissioner of this court ruled adversely against appellants on the stay as did the United States Supreme Court.

and, without creating a record, summarily granted attorney's fees in the amount of $64,752.02. From these decisions, the appellants appeal.

Initially, the question is whether there is any merit to appellants' claims regarding the affidavit of prejudice, the motion for a continuance to allow further discovery, the stay pending appeal, or the jury demand. There is none.

Affidavit of Prejudice

Appellants contend the fee hearing was a new action and demanded the trial judge be disqualified from hearing the motion. These issues have previously been determined adversely to appellants. *See Rhinehart v. Seattle Times Co.*, 51 Wn. App. at 579-80.

Additionally, the argument that remanding a case creates a new action is without merit. The cases cited by appellants in support of their claims discuss post-judgment modifications of divorce and custody decrees upon changed conditions. The same is not true here. There can be no claim under either RCW 4.12.050 and/or these circumstances that determining fees in a case on remand is a new action. The recent case of *State v. Clemons*, 56 Wn. App. 57, 782 P.2d 219 (1989), *review denied*, 114 Wn.2d 1005 (1990) is also instructive. In *Clemons* the court determined that a mistrial and the ensuing retrial (before the same judge) constituted the same case for purposes of RCW 4.12.050, and that the filing of an affidavit of prejudice before the retrial was untimely. Here, it is only reasonable that the judge who heard the case is best able to determine the fees allowed as part of the unfinished business of the case.

Motion for Continuance

Appellants asked for a continuance to pursue discovery in order to satisfy them that the fees requested by the respondents

were reasonable. The grant or denial of a continuance by a trial court will not be disturbed absent a showing of a manifest abuse of discretion by the trial court. *Turner v. Kohler,* 54 Wn. App. 688, 775 P.2d 474 (1989); *Layne v. Hyde,* 54 Wn. App. 125, 773 P.2d 83, *review denied,* 113 Wn.2d 1016 (1989). Moreover, discovery is a matter within the discretion of the trial court as well. *See State v. Strandy,* 49 Wn. App. 537, 540, 745 P.2d 43 (1987), *review denied,* 109 Wn.2d 1027 (1988). The trial court did not abuse its discretion in the case before us. Respondents' counsel presented detailed time sheets and was available to appellants for questioning under oath. Allowing discovery would have only served to further delay the proceeding.

Stay Pending Appeal

There is no viable argument to be made concerning the denial of the stay. A commissioner of this court denied the stay as did an order of the Supreme Court signed by Justice Sandra Day O'Connor.

Right to a Jury Trial

In the case before this court, the award of fees is based on the court's inherent authority to impose sanctions pursuant to the court rules and the Rules of Appellate Procedure, not upon any common law right or cause of action. A party has a right to a jury trial only when a legal cause of action is alleged. *Allard v. Pacific Nat'l Bank,* 99 Wn.2d 394, 399, 663 P.2d 104 (1983). Additionally, RCW 4.84 *et seq.*, clearly provide that the determination is to be made by the trial court.

In *Donaldson v. Clark,* 819 F.2d 1551, 1558 (11th Cir. 1987), the court rejected the same argument under Fed. R. Evid. 11, indicating that the court had the discretion to impose the sanctions. Other constitutional arguments raised by appellants are equally as frivolous. The Seventh Amendment does not apply to the states. *See Sofie v. Fibreboard Corp.,* 112 Wn.2d

636, 644, 771 P.2d 711, 780 P.2d 260 (1989). (The right to a trial by jury in a civil proceeding in Washington State, if it exists, is guaranteed by article 1, section 21 of our state constitution. Here, there was no legal cause of action.) Appellants also contend the failure to provide a jury trial is a violation of equal protection. This argument is vague and unsupported by citation of authority and need not be considered. *See In re Rosier,* 105 Wn.2d 606, 717 P.2d 1353 (1986). The trial court did not abuse its discretion by denying any of the appellants' motions.

Amount of Attorney's Fees

The only issue of weight is whether the amount of the fees awarded was reasonable. *See Singleton v. Frost,* 108 Wn.2d 723, 727, 742 P.2d 1224 (1987). The reasonableness of an award is subject to appellate review. *Key v. Cascade Packing Co.,* 19 Wn. App. 579, 585, 576 P.2d 929 (1978). However, the trial court's determination will not be reversed absent an abuse of discretion. *Allard v. First Interstate Bank of Wash., N.A.,* 112 Wn.2d 145, 148, 768 P.2d 998, 773 P.2d 420 (1989).

Appellants allege the trial court abused its discretion in determining the amount of fees awarded. At the hearing on remand, the trial court indicated its approval of the fees and costs as submitted by the respondents. There was no indication in the record of the hearing that the trial court made more than a summary determination in approving the fee. Appellants challenge the amount awarded as not being reasonable and the trial court failed to show on the record how it arrived at the figure awarded. While the amount may not be patently unreasonable, and while it must be recognized that the trial court has broad discretion to determine the amount of fee awards, the amount cannot be affirmed without some indication as to how the court reached the award. *See Progressive Animal Welfare Soc'y v. University of Wash.,* 54 Wn. App. 180, 186-87, 773 P.2d 114 (1989), *aff'd,* 114 Wn.2d 677 (1990). The trial court must

provide sufficient information concerning its fee determination to enable meaningful appellate review. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 596, 675 P.2d 193 (1983).

Here, although the fee awarded may indeed be reasonable, the determination by the court that the fee as presented by the affidavit of respondents' counsel is reasonable cannot be fully determined from the record. The trial court summarily gave the respondents what they asked for. There is no indication that the trial court considered the factors set forth in RPC 1.5(a)[2] in determining the fees to be awarded. A review of the affidavit of respondents' counsel indicates some duplication by attorneys for the work done. The trial court, at least on the record provided, did not seem to take any time to review the affidavit and make findings of fact. In calculating the amount of fees, the trial court *must* discount any duplicated or wasted effort by the attorneys. *Bowers v. Trnasamerica Title Ins. Co.*, 100 Wn.2d at 600. The determination of what consitutes reasonable attorney's fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful

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[2] The factors to be considered in determining the reasonableness of a fee under RPC 1.5(a) include:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

"(3) The fee customarily charged in the locality for similar legal services;

"(4) The amount involved and the results obtained;

"(5) The time limitations imposed by the client or by the circumstances;

"(6) The nature and length of the professional relationship with the client;

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

"(8) Whether the fee is fixed or contingent."

party billed. *Nordstrom, Inc. v. Tampourlos,* 107 Wn.2d 735, 744, 733 P.2d 208 (1987). From the record, it does not appear that the trial court weighed any factors other than counsel's affidavit of the hours spent. The trial court, instead of relying merely on the billing records, should have made an independent decision as to what represented a reasonable amount for attorney's fees. By summarily awarding the attorney's fees to the respondents, the court abused its discretion.

Respondents have asked for fees on appeal contending this action is frivolous. Because the case must be remanded for a better record to enable a proper determination of the fees to be awarded, the appeal cannot be said to be frivolous and fees on appeal are not in order.

The decision of the trial court cannot be upheld on the record before the appellate court. However, because the issue of attorney's fees has already been the subject of one hearing in the trial court and is a subject of this appeal, and because the history of this matter and related cases is such that further appeals appear certain, we believe that the appropriate remedy is to refer this case to the trial court for entry of appropriate findings on the issue of attorney's fees but for this court to retain jurisdiction.

Therefore, it is hereby ordered that this matter is referred to the trial judge that entered the orders that are the subject of this appeal for entry of findings of fact on the issue of the proper amount of attorney's fees to be awarded to respondents for their defense of these matters through trial. The trial court's findings shall be made from the record as presently constituted, unless the trial judge determines that additional evidence is necessary in order to comply with the principles set forth in this opinion. Any hearing hereon and entry of the findings shall be accomplished within 30 days of the filing of this opinion and order. After entry, the parties shall cause the findings, and any objec-

tions thereto, to be immediately transmitted to this court for such further action as shall prove necessary.

s/GROSSE, A.C.J.

WE CONCUR:

s/BAKER, J.

s/PEKELIS, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; LILLIAN YOUNG, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Appellants, KATHI BAILEY, a married person; TONI STRAUCH, a married person; and SYLVIA CORWIN, Plaintiffs, v. THE SEATTLE TIMES, a Delaware corporation, d/b/a/ THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY, Respondents.	No. 23526-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellants Keith Milton Rhinehart and The Aquarian Foundation having filed a motion for reconsideration herein, and the court having determined that it should be denied; now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration be, and the same hereby is, denied.

DATED this 27 day of September, 1990.

s/PEKELIS, J.
Presiding Judge

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.
s/WALTER E. WEBSTER, JR.
CHIEF JUDGE

FILED
MAY 3 1993
IN CLERKS OFFICE
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; LILLIAN YOUNG, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Appellants,

KATHI BAILEY, a married person; TONI STRAUCH, a married person; and SYLVIA CORWIN,

Plaintiffs,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Respondents.

No. 23526-5-I

DIVISION ONE

FILED:
MAY 3 1993

GROSSE J. — This case comes before this court after referral to the trial court for entry of findings of fact and conclusions of law to support the trial court's award of attorney

fees to respondents. We have reviewed those findings and conclusions and affirm the award of attorney fees.[1]

The trial court correctly based its decision as to the amount of fees to award on application of the factors set forth in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 596, 675, P.2d 193 (1983), to the particular fact and circumstances of this case.

The decision of the trial court is affirmed.

s/GROSSE, A.C.J.

WE CONCUR:

s/BAKER, J.

s/PEKELIS, J.

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[1] Final action by this court was delayed due to the inadvertent transmittal of this case to the Supreme Court prior to final action here.

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; LILLIAN YOUNG, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Appellants, KATHI BAILEY, a married person; TONI STRAUCH, a married person; and SYLVIA CORWIN, Plaintiffs, v. THE SEATTLE TIMES, a Delaware corporation, d/b/a/ THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY, Respondents.	No. 23526-5-I DIVISION ONE ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The appellants, Keith Milton Rhinehart, the Aquarian Foundation, Lillian Young, and Ilse Taylor, having filed a motion for reconsideration herein, and the Court having determined that it should be denied; now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration be, and the same hereby is, denied.

DATED this 9th day of June, 1993.

FOR THE PANEL: s/GROSSE, J.
Judge

THE SUPREME COURT OF WASHINGTON

KEITH MILTON RHINEHART, a single person; and THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, Petitioners, v. THE SEATTLE TIMES, a Delaware corporation, d/b/a/ THE SEATTLE TIMES; ERIK LACITIS and JANE DOE LACITIS, Respondents.	No. 60732-0 C/A NO. 23526-5-I

This matter came before Department II of the Court on its December 1, 1993, Motion Calendar on Petition for Review. Department II having considered the Petition and the files herein, and the five members of the Department having unanimously agreed;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 1st day of December, 1993.

s/(sig)
Chief Justice

APPENDIX B

RHINEHART v. SEATTLE TIMES CO.

Wash., 654 P.2d 673

98 Wash.2d 226

Keith Milton RHINEHART, a single person; the Aquarian Foundation, a Washington not-for-profit corporation; Kathi Bailey, a married person, Lillian Young, a married person, Toni Strauch, a married person, Sylvia Corwin, and Ilse Taylor, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Respondents,

v.

The SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a/ The Seattle Times; Walla Walla Union-Bulletin, Inc.; Erik Lacitis and Jane Doe Lacitis; John Wilson and Rebecca Wilson; John McCoy and Karen McCoy, Petitioners.

Nos. 47938-1, 48155-5.

Supreme Court of Washington, En Banc.

Dec 2, 1982.

As Changed Dec. 13, 1982.

On discretionary review of orders, entered by the King County Superior Court, Jack P. Scholfield, J., in a suit for defamation and invasion of privacy, granting defendant publishers' discovery motion but also granting plaintiffs a protective order limiting to trial purposes the use which defendants could make of such discovered information, the Supreme Court,

Rosellini, J., held that discovery rule is not unconstitutional in permitting the court to limit the use which the press or its members can make of information which they have received through discovery, upon a mere showing of "good cause"; even assuming that a protective order may fall, ostensibly at least, within the definition of a "prior restraint of free expression," the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the "heavy burden" of justification.

Orders affirmed.

Dolliver, J., filed a concurring opinion in which Brachtenbach, C.J., and Dimmick, J., concurred.

. . .

[17] Turning to the plaintiffs' cross appeal, the major contention is that requiring disclosure of membership lists, donors and benefactors violates the rights of privacy and the associational rights of these persons. As should be clear from our previous discussion, certain invasions of those rights are necessary to enable the courts to render a just decision upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.

The plaintiffs, as the defendants point out, are attempting to assert a privilege suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and find none which supports the theory in the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the

court's order insofar as was possible without denying the defendants the right to develop their defenses,.

With respect to this order, also, we find no abuse of discretion.

The orders are affirmed.

B-4

RHINEHART v. SEATTLE TIMES CO.

754 P.2d 1243 (Wash.App. 1988)

51 Wash.App. 561

Keith Milton RHINEHART, a single person; the Aquarian Foundation, a Washington not-for-profit corporation; Lillian Young, a married person; and Ilse Taylor, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Appellants,

and

Kathi Bailey, a married person; Toni Strauch, a married person; and Sylvia Corwin, Plaintiffs,

v.

The SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a/ The Seattle Times; Walla Walla Union-Bulletin, Inc.; Erik Lacitis and Jane Doe Lacitis; John Wilson and Rebecca Wilson; John McCoy and Karen McCoy, Respondents.

No. 19801-7-1.

Court of Appeals of Washington, Division 1.

May 31, 1988.

Reconsideration Denied Aug. 1, 1988.

Religious organization and individual members brought defamation suit against newspaper publisher and others. The Superior Court, King County, James Dore, J., dismissed, and appeal was taken. The Court of Appeals, Swanson, J., held that (1) organization and members were not entitled to more extensive protective order, (2) First Amendment rights of organiza-

tion and members were not violated by order compelling discovery of videotapes; (3) names and addresses of organization did not fall within scope of priest-penitent privilege; (4) dismissal of complaint was warranted due to failure of organization and members to comply with discovery order; and (5) appeal was frivolous.

Affirmed and remanded.

. . .

Jean Schiedler-Brown, Seattle, for Keith Milton Rhinehart.

Bruce E.J. Johnson, Howard Stambor, Davis, Wright & Jones, Evan L. Schwab, Bogle & Gates, Seattle, for The Seattle Times.

SWANSON, Judge.

Keith Milton Rhinehart; the Aquarian Foundation, a Washington not-for-profit corporation; Ilse Taylor; and Lillian Young[1]

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1 At oral argument appellants' counsel argued for the first time in this appeal that the dismissal of the action as to Ilse Taylor and Lillian Young was improper as a sanction for noncompliance with discovery since these individuals lacked custody of or control over the requested videotape and films. At the January 7, 1987, hearing at which the appellants' action was dismissed as a discovery sanction, the respondents' counsel argued that the female plaintiffs were suing in a representative, not individual, capacity on behalf of all women members of the Aquarian foundation as of March 17, 1978. The complaint appears to substantiate this contention.

In any event, appellants Taylor and Young do not claim, and the record does not indicate, that they responded to the request for production of the videotape and films by stating that the tapes were not in their possession, control or custody. *See La Chemise Lacoste v. Alligator Co., Inc.*, 60 F.R.D. 164 (D.Dela.1973). Absent a timely response or objection to a discovery request, the right to object may be waived. *Fretz v. Keltner*, 109 F.R.D. 303, 309 (D.Kan.1985); 4 L. Orland, Wash.Prac., *Rules Practice* § 5427, at 153 (3d ed. 1983).

Moreover, appellants Taylor and Young have provided no argument or citation to legal authority in the appellate briefs in support of this contention. RAP 10.3(a)(5); *Lassila v. Wenatchee*, 89 Wash.2d 804, 809, 576 P.2d 54 (1978); *Puget Sound Nat'l Bank v. Honeywell, Inc.*, 40 Wash.App. 313, 317 n. 1, 698 P.2d 584 (1985). We thus do not address this issue.

appeal the superior court order which dismissed their action for damages for defamation and invasion of privacy against the Seattle Times Company, a Delaware corporation d/b/a the Seattle Times; Walla Walla Union-Bulletin, Inc.; Erik and Jane Doe Lacitis, husband and wife; John and Rebecca Karen Wilson, husband and wife; and John and Karen McCoy, husband and wife. This appeal presents the following issues:

1. Did the dismissal of the appellants' complaint for noncompliance with the order compelling discovery of the films and videotape violate the appellants' right to the free exercise of religion?

2. Was discovery of the Aquarian Foundation's members' names and addresses protected by the priest-penitent privilege?

3. Was the dismissal of the appellants' complaint for noncompliance with discovery an abuse of discretion?

4. Did the trial court err in denying the appellants' motion for a change of judge?

5. Should the appellants be assessed terms for a frivolous appeal?

The facts underlying the action in this case and preceding this appeal have been set forth in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 22-27, 104 S.Ct. 2199, 2202-04, 81 L.Ed.2d 17 (1984) in part as follows:

> . . . Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation.
>
> . . .
>
> In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978, and

1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between $35,000 and $50,000 in cash and prizes. One article described a "chorus line of girls [who] shed their gowns and bikinis and sang. . ." . . .

Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors. Five female members of the Foundation who had participated in the presentation at the penitentiary joined the suit as plaintiffs. The complaint alleges that the articles contained statements that were "fictional and untrue," and that the defendants—petitioners here—knew, or should have known, they were false. According to the complaint, the articles "did and were calculated to hold [Rhinehart] up to public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader." With respect to the Foundation, the complaint also states: "[T]he articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes." The complaint alleges that the articles misrepresented the role of the Foundation's "choir"

and falsely implied that female members of the Foundation had "stripped off all their clothes and wantonly danced naked..." The complaint requests $14,100,000 in damages for the alleged defamation and invasions of privacy.

Petitioners filed an answer, denying many of the allegations of the complaint and asserting affirmative defenses. Petitioners promptly initiated extensive discovery. They deposed Rhinehart, requested production of documents pertaining to the financial affairs of Rhinehart and the Foundation, and served extensive interrogatories on Rhinehart and the other respondents. Respondents turned over a number of financial documents, including several of Rhinehart's income tax returns. Respondents refused, however, to disclose certain financial information, the identity of the Foundation's donors during the preceding 10 years, and a list of its members during that period.

Petitioners filed a motion under the State's Civil Rule 37 requesting an order compelling discovery... Respondents... moved for a protective order preventing petitioners from disseminating any information gained through discovery...

In a lengthy ruling, the trial court initially granted the motion to compel and ordered respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership. Relying on *In re Halkin*, 194 U.S.App.D.C. 257, 598 F.2d 176 (1979), the court refused to issue a protective order. It stated that the facts alleged by respondents in support of their motion for such an order were too conclusory to warrant a finding of "good cause" as required by Washington Superior Court Civil Rule 26(c)...

Respondents filed a motion for reconsideration in

> which they renewed their motion for a protective order. They submitted affidavits of several Foundation members to support their request. . .
>
> Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." The order prohibited petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process.

(References to the record and footnotes omitted.)

Upon cross-petitions for review, our state Supreme Court upheld the protective order against an attack on the basis of freedom of the press and of speech and the June 26, 1981, order compelling discovery against a challenge on grounds of violations of the rights of privacy and of association. *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 257-58, 654 P.2d 673 (1982). The United States Supreme Court denied the appellants' petition for certiorari, 467 U.S. 1230, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984), but granted the respondents' petition and upheld the protective order, *Seattle Times Co. v. Rhinehart*, 467 U.S. at 37, 104 S.Ct. at 2209-10.

During this time the original trial judge, who had moved to the state Court of Appeals, was replaced in the instant case by another judge. Upon the respondents' motion, the appellants were ordered to comply with the June 26, 1981, order compelling discovery by October 19, 1984. On that date, the appellants supplied nonresponsive and incomplete answers. In December 1984, the respondents served the appellants with a request for

production of certain films and a videotape of the Walla Walla performance. The appellants did not file timely objections or responses.

A challenge to the same requests for production was pending in this court. In *Rhinehart v. KIRO*, 44 Wash.App. 707, 708-09, 723 P.2d 22 (1986), *review denied*, 108 Wash.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co., Inc.*, __ U.S. __, 108 S.Ct. 51, 98 L.Ed.2d 16 (1987), this court held that the order compelling discovery of the films and videotape did not violate the appellants' freedom of religious exercise. *KIRO*, 44 Wash. App. at 711, 723 P.2d 22, further upheld the dismissal of the appellants' action against the respondents in that appeal for noncompliance with discovery.

In the instant case a scheduled October 31, 1986, hearing on the respondents' motions for dismissal for noncompliance with the 1981 discovery order and for a second order compelling discovery of the films and videotape was continued at the appellants' request because of a substitution of counsel. At this hearing the appellants' request for a change of judge was denied. At the rescheduled December 5, 1986, hearing, the trial judge dismissed the complaint of Rhinehart, the Aquarian Foundation and Kathi Bailey for noncompliance with the June 26, 1981, order compelling discovery; ordered the production by December 15, 1986, of the films and videotape requested by the respondents; and denied the appellants' motions for a protective order and for clarification of the June 26, 1981, discovery order.

The appellants did not comply with the December 5, 1986, order compelling discovery. After a January 7, 1987, hearing, the trial judge entered findings of fact and conclusions of law and dismissed the complaint of all the plaintiffs for failure to comply with the December 5, 1986, order compelling discovery and denied the appellants' motion for reconsideration of the prior orders. This appeal followed. After oral argument the respondents filed a motion for leave to correct or supplement the

record pursuant to RAP 9.10, which motion, unopposed by the appellants, was granted.

FREE EXERCISE OF RELIGION

[1] The appellants contend that their First Amendment rights were violated by the dismissal of their complaint for noncompliance with the order compelling discovery of the films and videotape, which the appellants claim are sacred objects. The respondents assert that the claim that the tapes' sanctity precludes discovery is suspect in light of the television broadcast to the public of the films and the fact that the videotape was of a performance before 1,100 prison inmates. They further contend, without dispute, that upon the December 1984 service of the request for production of the films and videotape, the appellants failed to object within the time period required by CR 34(b). Consequently, they argue, any objection has been waived.

> A waiver of the right to object or of a protective order may result from a failure timely to respond or object [to a request for the production of documents]. *Alexander v. Parsons* (D.C. Mich.1977) 75 F.R.D. 536; *Perry v. Golub* (D.C.Ala.1976) 74 F.R.D. 360; *Leve v. Schering Corp.* (D.C.N.J.1975) 73 F.R.D. 537, *affirmed* (C.A.3d) 556 F.2d 567, *certiorari denied* 434 U.S. 833, 98 S.Ct. 118, 54 L.Ed.2d 93.

4 L. Orland, Wash.Prac., *Rules Practice* § 5427, at 153 (3d ed. 1983). In any event, we find no First Amendment violation.

The appellants argue that the denial of a requested protective order resulted in the violation of their right to the free exercise of religion since they were compelled to provide discovery of what they consider to be sacred objects without a proper protective order. The only protective order entered in the instant case is limited to discovery of membership, donor and financial information which was compelled by the June 26,

1981, order and restricts use of the discovery information to litigation purposes.

On November 26, 1986, the appellants filed a motion for a protective order as to discovery of the films and videotape which would have imposed the following restrictions:

> 2. Plaintiffs may comply with defendant Seattle Times' Second Request for Production of Documents as follows:
>
> (a) by allowing defendants to view the relevant portions of the films and videotapes requested therein in which the identities of person[s] depicted in the films and videotapes have been obscured.
>
> (b) that defendants need only produce for viewing such portions of the films and videotapes as defendants reasonably specify will provide information likely to lead to admissible evidence.
>
> (c) that defendants be prohibited from making any public disclosure of the films or making any use thereof except for the legitimate purposes of preparing for trial and no portions thereof should be entered into [the] public record without further order of this court.

The motion expressly states that the proposed protective order sought to permit compliance with production by allowing the respondents to view the films and videotape in the church. Besides limiting the films' use to litigation purposes, the requested protective order, unlike the prior protective order entered in the case, sought to impose certain other restrictions and conditions.

The respondents argue that *Rhinehart v. KIRO,* 44 Wash.App. 707, 723 P.2d 22 (1986), *review denied,* 108 Wash.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co., Inc.,* __ U.S. __, 108 S.Ct. 51, 98 L.Ed.2d 16 (1987), is controlling. In *KIRO,* 44 Wash.App. at 708-09, 723 P.2d 22, an order compelling discovery of the three videotapes at issue in

the instant case survived a challenge on grounds of a violation of the freedom to exercise religion. *KIRO,* at 709, 723 P.2d 22, notes that no showing was made that the protective order was inadequate to prevent abuse of discovery. The protective order in *KIRO* is similar to the 1981 protective order entered in the instant case in limiting the use of the discovery information to litigation purposes. *KIRO,* at 708, 723 P.2d 22.

The 1981 protective order was found not to violate freedom of the press or of speech. *Rhinehart v. Seattle Times Co.,* 98 Wash.2d 226, 256, 654 P.2d 673 (1982), *cert. denied,* 467 U.S. 1230, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984). Thus had the appellants sought such a protective order as to the compelled discovery of the films and videotape, it could not have been attacked on these First Amendment grounds. Instead, the appellants sought a protective order which would have imposed other restrictions and conditions. *Rhinehart,* at 257, 654 P.2d 673, states:

> The more extensive protection which [the plaintiffs] desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right.

The appellants here had no absolute right to a more extensive protective order.

CR 26(c) sets forth the procedure for requesting a protective order:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending. . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . .

See Rhinehart, at 232, 654 P.2d 673, " '[G]ood cause' is established if the moving party shows that any of the harms

spoken of in the rule is threatened and can be avoided without impeding the discovery process." *Rhinehart,* at 256, 654 P.2d 673.

The appellants argue that the protective order was necessary to satisfy their objections to the discovery based upon privacy concerns, the priest-penitent privilege and the sacredness of the tapes. However, any objections to disclosure based upon privacy, the confidentiality of members' identities, and the showing of the tapes outside the sanctity of the church are difficult to justify since two of the requested tapes have already been broadcast to the public on television. *Rhinehart v. KIRO, supra 44* Wash.App.2d at 708-09, 723 P.2d 22. Further, the 1981 protective order prohibited the nonlitigation use of information regarding the members' identities acquired through the discovery process.

To be weighed against the appellants' asserted interests are the interests of the respondents, who are seeking discovery in order to prepare their trial defense. *See Rhinehart v. Seattle Times, supra* 98 Wash.2d at 256, 654 P.2d 673. As both *Rhinehart v. Seattle Times, supra* at 257-58, 654 P.2d 673, and *Rhinehart v. KIRO, supra* 44 Wash.2d at 709, 723 P.2d 22, note, the appellants "are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information." In requesting the particular protective order that they proposed, the appellants have failed to make the requisite "good cause" showing that any of the harms mentioned in the rule was threatened and could be avoided without impeding the discovery process. *Rhinehart v. Seattle Times, supra* at 256, 654 P.2d 673. The trial court did not abuse its discretion in denying the request for the more extensive protective order. *Rhinehart,* at 257, 654 P.2d 673.

[2] Even if the refusal to issue the proposed protective order was not an abuse of discretion, the question is whether the

order compelling the production of the films and videotape violated the appellants' right to the free exercise of their religion. Like the court in *Rhinehart v. KIRO, supra* 44 Wash.2d at 708-09, 723 P.2d 22, we find meritless the appellants' argument that their freedom to exercise religion was violated by the order compelling discovery of the tapes. The cases upon which they rely involve restrictions on the free exercise of religion and are inapposite. The discovery order here did not impinge upon their right to the free exercise of religion.

As *KIRO,* at 709, 723 P.2d 22, notes:

> Rhinehart and the Foundation are willing to allow KIRO and KOMO to view the "sacred" tapes. Their main objection is to their copying. It is thus not against their religious principles that these tapes may be viewed by persons other than members (such a position would be hard to maintain since two of the tapes had already been broadcast to the public at large). Rather, the appellants fear that the tapes will be disseminated to the public at large thus putting members at risk. It was precisely because of this argument that the trial court issued the protective order. The arguments propounded by appellants are really ones that should be made in support of an invasion of privacy action. Having lost this argument already, it appears that appellants are substituting religious freedom in its place.

Here the 1981 protective order shields the appellants against abuse of discovery related to the members' identities. In *Rhinehart v. Seattle Times, supra* 98 Wash.2d at 257, 654 P.2d 673, our state Supreme Court found no showing that this same protective order was inadequate to safeguard against any such threatened abuse of discovery. Like the court in *Rhinehart v. KIRO, supra,* in which a similar protective order was entered upon the issuance of an order compelling discovery of the same films and videotape at issue here, we find no such a showing in

the instant case.

PRIEST-PENITENT PRIVILEGE[2]

[3] RCW 5.60.060(3)[3] sets forth the priest-penitent privilege:

> A clergyman or priest shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

Although no Washington case has construed this statute, L. Orland and K. Tegland explain this privilege, including its limited scope, as follows:

> It provides that a priest or clergyman shall not be examined regarding any confession made to him in his professional capacity within the discipline of the church to which he belongs without the consent of the person making the confession. In statement the statue is narrow, requiring that the confession be made "in the course of discipline enjoined by the church to which he belongs." The proposed, but unadopted, privilege in the Federal Rules of Evidence would have protected a confidential communication to a clergyman in his professional character as spiritual advisor.

(Footnotes omitted.) *The Federal Rules of Evidence: Washington Follows the Federal Model,* 15 Gonz.L.Rev. 277, 327-28 (1980).

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2 The respondents contend that an objection to discovery based upon the priest-penitent privilege is untimely, not having been asserted in the appellants' original responses to the discovery request, in their 1981 arguments to the trial court, or in their prior appeal of the order compelling discovery of, among other things, membership information. Our disposition of the privilege issue makes it unnecessary to address this contention.

3 In 1987 RCW 5.60.060(3)'s language was altered to be gender neutral. Laws of 1987, ch. 439, § 11, p. 1791.

> In the application of the [priest-penitent privilege] statutes, . . . it has been held, following the dictates of principle, that the privilege applies only to a communication made in the understood pursuance of that church discipline which gives rise to the confessional relation, and, therefore, in particular to confessions of sin only, not to communications of other tenor.

In re Estate of Soeder, 7 Ohio App.2d 271, 220 N.E.2d 547, 568-69 (1966); 8 J. Wigmore *Evidence* § 2395, at 876-77 (McNaughton Rev.1961). The appellants have not shown that the names and addresses of the Aquarian Foundation members fall within the scope of this privilege.

DISMISSAL OF COMPLAINT

On December 5, 1986, an order was entered dismissing the complaint of Rhinehart and the Aquarian Foundation for failure to comply with the June 26, 1981, order compelling discovery of, among other things, membership information. On January 7, 1987, the trial court entered findings of fact, conclusions of law and an order dismissing the appellants' complaint for violating the December 5, 1986, order compelling discovery of certain films and a videotape.

CR 37(b)(2)(C) provides in part:

> If a party or an officer, director, or managing agent of a party . .. fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part

> thereof, or rendering a judgment by default against the disobedient party[.]

Anderson v. Mohundro, 24 Wash.App. 569, 573, 604 P.2d 181 (1979), *review denied,* 93 Wash.2d 1013 (1980).

[4,5] The remedy for a party's failure to comply with discovery lies within the trial court's discretion. *Rhinehart v. KIRO,* 44 Wash.App. 707, 710, 723 P.2d 22 (1986), *review denied,* 108 Wash.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co., Inc.,* __ U.S. __, 108 S.Ct. 51, 98 L.Ed.2d 16 (1987). Absent a manifest abuse of discretion, the appellate court will not overturn the trial court's exercise of its broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order. *Rhinehart v. KIRO, supra.*

In *Associated Mortgage Investors v. G.P. Kent Constr. Co., Inc.,* 15 Wash.App. 223, 228-29, 548 P.2d 558, *review denied,* 87 Wash.2d 1006 (1976), this court stated that

> the sanction of a default judgment authorized by CR 37(b)(2)(C) is a harsh remedy, which should only be granted where there has been a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial.
>
> But the unexplained failure to furnish complete and meaningful answers to these material interrogatories in the face of the court's order impels a conclusion that the refusal was willful. In this connection we note that CR 37(a)(3) allows the court to treat an evasive or incomplete answer as a "failure to answer." In our opinion, any violation of an explicit court order without reasonable excuse or justification must be deemed a willful act.
>
> We next turn to the contention that the sanction was unjust in that other less drastic alternatives to default would have been sufficient. Cases are legion holding

> that the choice of sanctions for violation of a discovery order is discretionary and that the particular facts and circumstances of each case will determine whether the discretion has been abused. In this state CR 37 vests broad discretion in the trial court as to choice of sanctions. A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

(Citations omitted.) *Anderson v. Mohundro, supra* 24 Wash.App. at 573-74, 604 P.2d 181.

[6] The appellants contend that they substantially complied with the discovery order by supplying substantial information, including over 150 articles, while seeking to uphold their rights to privacy, freedom of association and freedom of religious exercise. They further contend that no prejudice to the respondents has been shown in that the videotapes sought concern only collateral issues and the respondents' interests are adequately protected by the appellants' offer to permit the tapes to be viewed in the church. Last, the appellants argue that dismissal was too severe a sanction since the videotapes had only limited relevance to either the claims or possible defense and the appellants themselves would be unable to use the tapes at trial, thus jeopardizing their ability to sustain their burden of proof.

In June 1980 the respondents served on the appellants interrogatories and requests for production to which the appellants raised objections and filed vague and evasive responses. The respondents moved to compel discovery, and the appellants moved for a protective order. After several hearings on the two motions, the trial judge entered both an order compelling discovery and a protective order on June 26, 1981. Upon cross-petitions for review, our state Supreme Court upheld both

orders. The United States Supreme Court denied the appellants' petition for certiorari, 467 U.S. 1230, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984), but granted the respondents' petition and upheld the protective order, 467 U.S. 20, 37, 104 S.Ct. 2199, 2209-10, 81 L.Ed.2d 17 (1984).

On August 20, 1984, the appellants were ordered to comply with the June 26, 1981, order compelling discovery by October 19, 1984. On that date, the appellants provided incomplete and evasive responses.

In December 1984 the respondents requested that the appellants produce certain films and a videotape which they claim are relevant to the appellants' status as public figures, to the truth of the respondents' publications and to the damages which the appellants allegedly suffered. The requested videotape is of the Walla Walla performance, which was the subject of the respondents' publications that the appellants claim are defamatory. The appellants failed timely to object or respond to these requests. At the time, appellate review was pending of legal challenges to the same request for production in *Rhinehart v. KIRO,* 44 Wash.App. at 707, 723 P.2d 22. *KIRO* found meritless the appellants' objection to discovery on grounds of freedom of religious exercise and upheld the dismissal of the appellants' action as a discovery sanction under CR 37.

At the October 31, 1986, scheduled hearing on the respondents' motions (1) to dismiss the appellants' complaint for failure to comply with the 1981 order compelling discovery and (2) to compel production of the films and videotape, the appellants were granted a continuance based upon the substitution of counsel and were assessed terms of $250, and the appellants filed an affidavit of prejudice against the trial judge.

At the continued December 5, 1986, hearing, the trial court granted the respondents' motions to dismiss and to compel production and denied the appellants' motions for a protective

order and for clarification of the 1981 discovery order. The appellants did not comply with the December 5, 1986, order compelling discovery and filed a motion for reconsideration of the prior orders, which was subsequently denied. On January 7, 1987, findings and conclusions were entered and the appellants' complaint was dismissed with prejudice a second time based upon their failure to comply with the December 5 discovery order.

The facts here are similar to those in *Anderson v. Mohundro, supra* 24 Wash. App. at 574-75, 604 P.2d 181, and *Rhinehart v. KIRO, supra* 44 Wash.App. at 711, 723 P.2d 22. The appellants either supplied vague and incomplete answers or failed to respond to the interrogatories and requests for production so that the respondents were required to seek orders compelling discovery. The trial court issued two separate orders requiring compliance with discovery requests, subject to the protective order, and allowed a reasonable time for compliance. The appellants gave incomplete and evasive answers or no response. After hearing the parties' arguments, the trial court found that the appellants had violated the orders compelling discovery and entered orders of dismissal on December 5, 1986, for noncompliance with the June 26, 1981, discovery order and on January 7, 1987, for refusing to obey the December 5, 1986, discovery order.

Although the appellants claim that their failure to comply was neither willful nor deliberate since it was based upon their First Amendment rights, these objections were rejected in *Rhinehart v. Seattle Times,* 98 Wash.2d at 226, 654 P.2d 673, and *Rhinehart v. KIRO,* 44 Wash.App. at 707, 723 P.2d 22. "A violation of the discovery rules is willful if done without a reasonable excuse." *Taylor v. Cessna Aircraft Co.,* 39 Wash.App. 828, 836, 696 P.2d 28, *review denied,* 103 Wash.2d 1040 (1985); *Rhinehart v. KIRO, supra.* The respondents have been prejudiced by the withholding of evidence relevant to the preparation of their defense, and no less drastic sanction would

suffice. *See Hampson v. Ramar,* 47 Wash.App. 806, 815, 737 P.2d 298 (1987); *Anderson v. Mohundro, supra* 24 Wash.App. at 575, 604 P.2d 181. We will not disturb the trial court's exercise of discretion here. *Rhinehart v. KIRO, supra.*

ALLEGED TRIAL COURT PREJUDICE

[7] Under RCW 4.12.040 and .050, any party in a superior court proceeding has the right to one change of judge if he files a motion supported by an affidavit of prejudice before the trial court rules on any motion or issue which requires the exercise of discretion. *State v. Hansen,* 107 Wash. 2d 331, 333, 728 P.2d 593 (1986); *In re Estate of Shaughnessy,* 104 Wash.2d 89, 92, 702 P.2d 132 (1985).

[8] The appellants contend that the denial of their request for a change of judge was error since no discretionary ruling had been made before the affidavit of prejudice was filed. Discretionary rulings exclude

> the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail[.]

RCW 4.12.050; *Wilson v. Henkle,* 45 Wash.App. 162, 172, 724 P.2d 1069 (1986). Setting or renoting and resetting a cause or motion for hearing is a calendaring action which falls outside the discretionary classification. *State v. Dixon,* 74 Wash.2d 700, 703, 446 P.2d 329 (1968).

[9] Rulings involving the exercise of discretion include the granting of a continuance, *State v. Maxfield,* 46 Wash.2d 822, 829, 285 P.2d 887 (1955); the issuance of process upon an application for a modification of an order, *State ex rel. Mead v. Superior Ct.,* 108 Wash. 636, 640, 185 P. 628 (1919); and the denial of a request for a jury trial, *State ex rel. Farmer v. Bell,*

101 Wash. 133, 134, 172 P. 221 (1918).

[10,11] The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court's discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party's request. *State ex rel. Mead v. Superior Ct., supra.* Here both the August 20, 1984, order setting October 19, 1984, as the date for complying with the June 26, 1981, discovery order and the October 31, 1986, order permitting the substitution of counsel were discretionary rulings so that the affidavit of prejudice was filed too late.[4]

The rulings in the instant case are distinguishable from the judge's actions which were found not to involve the exercise of discretion in *In re Hiebert,* 28 Wash.App. 905, 910, 627 P.2d 551 (1981). In *Hiebert,* at 909, 627 P.2d 551, the judge had reappointed the same guardian ad litem for the child, appointed an attorney for the father, reappointed the attorney for the mother, and set the case for hearing upon a second petition for permanent deprivation of parental rights. *Hiebert,* at 910, 627 P.2d 551, notes: "In most cases, only after the appointment of counsel would the law pertaining to affidavits of prejudice be known to the party." In the instant case, prior to the most recent substitution of appellants' counsel, the appellants had other attorneys representing them so that *Hiebert* is inapposite. Setting the case for a hearing in *Hiebert* was a calendaring action excluded from the discretionary classification under RCW 4.12.050. *Wilson v. Henkle, supra.*

Although prejudice is not deemed to be established since the appellants failed timely to comply with the statutory require-

4 The letter purportedly reserving the appellants' right to file an affidavit of prejudice against Judge Dore, referred to in the Brief of Appellants, at 4, is not in the record. The citation to the record indicated in the appellants' brief is to a "Declaration of Counsel" in which the appellants' present counsel states, among other things: "This case is preassigned and to my knowledge the assigned judge has not made decisions affecting these substantive matters."

ments, *State v. Cockrell,* 102 Wash.2d 561, 565, 689 P.2d 32 (1984), the appellants nonetheless argue that actual prejudice is shown in certain comments of Judge Dore during the proceedings. Since the appellants cite no legal authority in support of their actual prejudice argument, we need not address this issue. *Puget Sound Nat'l Bank v. Honeywell, Inc.,* 40 Wash.App. 313, 317 n. 1, 698 P.2d 584 (1985). In any event, the appellants have failed to make the requisite "affirmative showing of prejudice which would alter the outcome of the pending litigation" to be entitled to relief on this ground. (Citation omitted). *Williams & Mauseth Ins. Brokers, Inc. v. Chapple,* 11 Wash.App. 623, 629, 524 P.2d 431 (1974).

The judge's comments at the October 31, 1986; December 5, 1986; and January 7, 1987, hearings, which were made in rendering his decisions on motions before him, do not necessarily and inevitably compel the conclusion that the trial court was prejudiced against the appellants. *Williams & Mauseth v. Chapple, supra.* At the October 31 hearing the judge granted the appellants' motion for a continuance and assessed them $250 in terms. Nevertheless, it cannot be said that the award of terms is evidence of unfair prejudice against the appellants since a continuance was sought on the basis that on the day of the scheduled hearing on the respondents' motions to dismiss and to compel production of the videotape and films, the appellants requested the substitution of counsel and their new counsel requested time to review the record before a hearing on the motions.

At the December 5 hearing, the respondents' proposed orders to compel discovery or dismiss and to dismiss were entered, but their request for reimbursement of their incurred expenses was denied. Similarly on January 7, 1987, the respondents' second proposed order of dismissal was entered and the appellants' reconsideration motion was denied, but an assessment of terms against the appellants was denied.

FRIVOLOUS APPEAL

[12] The respondents seek, on two grounds, an attorney fee award as terms for a frivolous appeal. The first basis, CR 11, which is made applicable to appeals by RAP 18.7, provides in part:

> The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum that to the best of his knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification ,or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

See Miller v. Badgley, 51 Wash.App. 285, 753 P.2d 530, 538 (1988). A party or an attorney or both may be assessed litigation expenses, including reasonable attorney fees, for a CR 11 violation. *See Wilson v. Henkle,* 45 Wash.App. 162, 174, 724 P.2d 1069 (1986). Here in entering the second order of dismissal, the trial court concluded that the appellants' objections to complying with the December 5, 1986, order compelling discovery were "frivolous and in bad faith because this issue has already been decided against them in this lawsuit and in another lawsuit."

[13] The respondents' second asserted basis for an attorney fee award, RAP 18.9(a), authorizes this court to impose sanctions against a party who brings an appeal for the purpose of delay where the other party is harmed by the delay. *Millers Cas. Ins. Co. of Texas v. Briggs,* 100 Wash.2d 9, 15, 665 P.2d 887 (1983). An appeal is frivolous and brought for the purpose of delay if it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that there was no reasonable possibility of reversal. *Millers Cas. Ins. v Briggs, supra.*

[14] Here even if some of the issues presented in this appeal have not been waived, the issues are devoid of merit with no reasonable possibility of reversal since most of the issues are governed by *Rhinehart v. Seattle Times Co., supra,* and *Rhinehart v. KIRO, supra,* and the other issues are not debatable issues upon which reasonable minds might differ.

We affirm the judgment below and award terms for a frivolous appeal. Under RAP 18.1(e) we remand for the trial court to determine what it deems to be a reasonable amount of the respondents' appellate attorney fees which is to be assessed against the appellants as terms. *See Singleton v. Frost,* 108 Wash.2d 723, 730-34, 742 P.2d 1224 (1987).

GROSSE and WILLIAMS, JJ., concur.

APPENDIX C

Constitution of the United States of America

AMENDMENT XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

§ 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

REVISED CODE OF WASHINGTON

Title 4 RCW: Civil Procedure

4.84.185 Prevailing party to receive expenses for opposing frivolous action or defense. In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute. [1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

STATE OF WASHINGTON SUPERIOR COURT
CIVIL RULES
CR 26

5. DEPOSITIONS AND DISCOVERY
(RULES 26-37)

RULE 26
GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

. . .

RULE 38

JURY TRIAL OF RIGHT

(–) Defined. A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.

(a) Right of Jury Trial Preserved. The right of trial by jury as declared by article 1, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate.

(b) Demand for Jury. At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law. If before the case is called to be set for trial no party serves or files a demand that the case be tried by a jury of 12, it shall be tried by a jury of 6 members with the concurrence of 5 being required to reach a verdict.

(c) Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver of Jury. The failure of a party to serve a demand as required by this rule, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

APPENDIX D

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Keith Milton Rhinehart, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, Appellants, v. THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times, ERIK LACTIS [*sic*] and JANE DOE LACTIS [*sic*].	COURT OF APPEALS No. 23526-5-I

BRIEF OF APPELLANT

JEAN SCHIEDLER-BROWN
Attorney for Aquarian
Foundation, Appellant

The Law Offices of
Jean Schiedler-Brown & Assoc., P.S.
606 Post Avenue, Suite 101
Seattle, WA 98104

. . .

C. *Summary Statement*

II. The Trial Court erred in the determination of attorney's fees by denying Appellants request for a trial by jury as allowed at law and thus violating Appellants Constitutional Rights as provided under the Equal Protection Clause of the United States Constitution.

A. *Issues*

1. *The Trial Court should have granted Appellants request for a trial by jury as allowed at law and thus the Trial Court violated Appellants Constitutional Rights under the Equal Protection Clause of the United States Constitution. [CP114]*

    a. facts

    b. legal authority

2. *Appellants request for a trial by jury should be granted as Appellants are entitled to a jury trial as the action is one at law.*

3. *Appellants request for a trial by jury should be granted as it is a fundamental right as provided under the Equal Protection Clause of the United States Constitution.*

. . .

III. Appellants contend the Trial Court erred in failing to grant Appellants motion for continuance pursuant to Civil Rule 40, and such denial resulted in violation of Appellants Due Process rights and rights under the Equal Protection clause of the Constitution.

A. Trial Court's failure to allow Appellants a continuance to pursue discovery denied Appellants rights of due process and equal protection as provided by the United States Constitution.

. . .

ARGUMENT

ISSUE II

The Trial Court should have granted Appellants request for a trial by jury as allowed at law and thus the Trial Court violated Appellants Constitutional Rights under the Equal Protection Clause of the United States Constitution. [CP114]

A. Facts relevant to Appellants request for a trial by jury.

Plaintiffs demanded the presence of a jury in the Motion for Enforcement of the Court of Appeals Judgment Awarding Attorneys fees. The Trial Court denied Plaintiff's motion. *(CP162-163).* The right of trial by jury in a civil action is preserved in Article 1 Section 21 of the Washington State Constitution and as adopted and enumerated through Civil Rule 38 (a) which states: "the right of a trial by jury as declared in Article 1 Section 21. . . shall be preserved to the parties as inviolate."

B. Appellants Contend Denial of Jury Trial Violates Constitutional Rights of Equal Protection.

The right to a jury trial is a fundamental right guaranteed to the people under the equal protection clause of the Constitution. The Equal Protection Clause guarantees that the government must treat people in similar situation with an equal amount of fairness. Appellants, as a religious order, have the same rights as other individuals to be granted a trial by jury.

This case and issue presents a question of law and debatable facts and thus parties have a right to a trial by jury.

The concept of a trial by jury is so fundamental and important within our legal system that to deny Appellants such a trial would be violating a basic Constitutional right.

. . .

Trial Court's failure to allow Appellants a continuance to pursue discovery denied Appellants rights of Due Process and Equal Protection as provided by the United States Constitution.

Denial of Appellants request for a continuance constituted a violation of Appellants Due Procees *[sic]* rights. Appellant had a right to Procedural Due Process guaranteed in the Fifth and Fourteenth Amendments of the United States Constitution and Article 1 Section 3 of the Washington State Constitution. The right to due process means that government cannot deprive a person of life, liberty, or property without due process of law. *Duncan v. State of LA*, 39 U.S. 145, 885 S. Ct. 144 [1968].

Article 1 Section 3 of the Washington State Constitution guarantees a person due process of law, which is designed to protect against arbitrary action by the state. *Systems Amusement, Inc. v. State, supra.*

As previously stated, due process requries *[sic]* an opportunity to be heard at a reasonable time and in an effectual manner. *Reilly v. State* 18 WA App 245, 566 1283 (1977). Not allowing discovery deprived Appellant of an effectual opportunity to be heard.

Denial of Appellants continuance deprived Appellants of essential case preparation, barring Appellants from effectively opposing the action and prejudicing their case.

. . .

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; LILLIAN YOUNG, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Appellants, KATHI BAILEY, a married person; TONI STRAUCH, a married person; and SYLVIA CORWIN, Plaintiffs, v. THE SEATTLE TIMES, a Delaware corporation, d/b/a/ THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY, Respondents.	No. 23526-5-I MOTION FOR RECONSIDERATION OF AFFIRMATION OF FINDINGS ON REMAND

. . .

3. ***The court's denial of Aquarian Foundation's right to obtain discovery and present evidence regarding the reasonableness of the fees deprived this party of its due process rights.***

In general, parties are permitted broad "discovery regarding any matter, not privileged, which is relevant to the subject

matter involved" in the lawsuit. *State v. Hamilton,* 24 Wn.App 927, 604 P.2d 1008, 1012 (1979); CR 26(b)(1). The trial judge possesses a broad discretion to manage discovery in a fashion that will implement the philosophy of disclosure of relevant information. *Hamilton* at 1013. In order to enhance the search for truth, trial courts are encouraged to exercise their discretion to permit discovery. *State v. Mecca Twin Theater & Film Exchange, Inc.,* 82 Wn.2d 87, 507 P.2d 1165, 1167 (1973).

Here, the reasonableness of attorney's fees, the basis for the request for discovery was brought to the trial court's attention. However, Aquarian Foundation's attorney's request for discovery on that issue was denied. In *Hamilton* that was sufficient to serve the issue for review. Here, as in *Hamilton,* the judge appeared to have improperly limited access to relevant, unprivileged information within a party's control. Therefore, it should be concluded here as in *Hamilton,* that the trial court improperly curtailed discovery.

Procedural due process requires at the minimum notice and an opportunity to be heard by an unbiased tribunal. The *Mathews v. Eldridge,* 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18 (1976), balancing test is employed to determine when and how formal a hearing must be. The importance of the interest involved and risk of erroneous deprivation is weighed against the cost, burden, and availability of additional safeguards. Here, an important interest is involved because a severe economic burden, which facially and as applied appeared punitive, is being placed upon a minoritarian Church. The risk of erroneous deprivation could easily be avoided by allowing discovery depositions and a hearing on the reasonableness of attorney's fees. The cost and limited burden of allowing the discovery requested does not outweigh Aquarian Foundation's interest and the risk of deprivation faced by Aquarian Foundation. The discovery requested would have provided the additional safeguards regarding claimed attorney's fees. However, because that discovery was not allowed the trial court manifestly abused

its discretion and under *Mathews v. Eldridge,* Aquarian Foundation was not afforded sufficient procedural due process.

A state violates the Equal Protection clause when it irrationally treats differently those similarly situated or when it irrationally treats similarly those people situated differently. *Silva v. Vowell,* 621 F.2d 640, rehearing denied 625 F.2d 1016, *cert. denied,* 101 S.Ct. 941, 449 U.S. 1125, 67 L.Ed.2d 111 (1980). Other litigants have been able to obtain discovery in cases disputing the reasonableness of attorney's fees as held in cases cited herein. There was no logical reason provided by the trial court to deprive Aquarian Foundation of discovery on the issue of reasonable attorney's fees when discovery and a hearing has been and would be allowed in other cases on the same issue. The Equal Protection clause was clearly violated here. *Any* litigant in *any* case involving disputed attorneys fees has, under the Rules of Civil Procedure, an automatic right to discovery and to time to prepare for an evidentiary hearing, whether the fees at issue are very small or very large. **There is no rational reason, and no expressly articulated policy or interest, that would deprive litigants who are subject to award of reasonable fees as terms of these same procedural safeguards.** Therefore, the record on remand was created without affording Aquarian foundation the right to constitutional protected safeguards, and must be stricken. The award must be reversed and remanded for a full evidentiary hearing with procedural safeguards that are afforded to other litigants who contest attorneys fees.

. . .

D-9

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KEITH M. RHINEHART,

Plaintiff,

vs.

THE SEATTLE TIMES,

Defendant.

No. 80-2-02460-4

VERBATIM REPORT OF PROCEEDINGS

HEARD BEFORE: THE HONORABLE JAMES J. DORE

January 9, 1989

APPEARANCES:

JEAN SCHIEDLER-BROWN, Attorney-at-law, appearing on behalf of the plaintiff;

HOWARD STAMBOR and BRUCE JOHNSON, Attorneys-at-law, appearing on behalf of the defendant;

WHEREUPON, the following proceedings were had and done:

Reported by: Ladd A. Sutherland, RPR, Official Court Reporter

MS. SCHIEDLER-BROWN:

. . .

Secondly, Your Honor, yes, we have, we've moved for a jury trial in this matter. And I'm really surprised at how shocked opposing counsel is that we have moved for a jury trial. We have a consitutional provision — both the United States Consitution and in this State — providing that all matters are allowed a jury trial. We also have a civil rule in this State again providing that the right to a jury trial is inviolate.

This particular matter — the determination of attorney's fees — is exactly the same as any other matter where a court enters a judgment without entering the amount. It's exactly the same as any other matter where there is a monetary figure to be determined. All of the case law, as we have cited in our brief, relates to the fact that the only situation where an individual doesn't have a right to a jury trial are cases in equity where there's a non-monetary decision made by the court. The application for attorney fees is one hundred percent a monetary application. It's asking the Court, "Court, I want you to determine how much time was spent, whether that was reasonable, what the fees should have been," a very specific factual decision that juries make every single day.

If these attorneys, Your Honor, had sued their own clients for these fees, their clients would be entitled to a jury trial in determining these fees. This issue is exactly the same as every other debt matter. To deny individuals in the position of my clients the right to a jury trial when every other person in every other situation who has a debt that they need determined by a finder of fact in a court of law would be to deny my clients the right to equal protection under the law. My clients have just as much right to a jury trial to determine these fees as everyone else.

And I don't think that Your Honor or any other judge sitting on the bench can look at any person requesting a jury trial — which is their right — as an attempt to prevent the judge from making the decision. That is simply a nonsequitur. It's a ridiculous assumption. Every individual has a right to a jury trial where there are money matters being determined.

In this case opposing counsel wants over $60,000 to be awarded by this Court. That's a substantial amount of money. My clients certainly have the right to be afforded basic protections that are constitutionally guaranteed in order to have that amount determined in a fair fashion.

That is why we have moved for a continuance today. Opposing counsel wants this Court to award fees based upon an affidavit of counsel. I have had no opportunity for discovery, no opportunity to ascertain behind that affidavit precisely why particular items were incurred. I've pointed out in our response to this motion many, many questions that I have about the validity of those fees — time spent celebrating the decision by the Court of Appeals, time spent talking to legal interns who happened to call up because they wanted to do an article on the matter. Should those fees be charged against my clients? Innumerable hours were spent conferring, reviewing files, talking to each other. How many of those hours should be determined to be allowed by this Court? I cannot propose to the Court a specific amount of fees that I find reasonable based upon the materials submitted by opposing counsel because I haven't had a chance to look at the foundational documents, the source documents. I haven't had a chance to cross-examine counsel or do further discovery on many of these questionable entries on the affidavit they have submitted.

Again, any attorney who would sue their own client to collect the fees would be subject to an evidentiary hearing. And I would totally object to the Court holding a hearing here and

now without my having an opportunity to review those sources and follow up on the witnesses who the attorneys may name to verify the fees. I would submit particularly of this amount of damages you can be sure that the parties would do extensive discovery to determine the reasonableness of that amount of money.

I would point out to the Court additionally, Mr. Johnson, one of the attorneys for the "Seattle Times," stated and was quoted in the "Seattle Times" own newspaper right after the appellate decision was announced that fees incurred were approximately $38,000. Today, before the Court — and that statement was made after oral argument, after the brief was prepared, after all of the major work was done for this appeal— today opposing counsel comes before the Court, and suddenly they have incurred $25,000 more in fees after they learned that they would be awarded quote, unquote "reasonable fees." They tacked on 25,000 more.

I want to know where that $25,000 came from. And my clients have a right to know that, Your Honor. It is an absolute right of any party to do discovery in litigation. This is litigation.

It would be a violation of a second constitutional right to deny my clients the right to do discovery in this case. They have not had the due process to discover the facts upon which they are going to be charged some sum of money. They have never had the opportunity to do this. This case was just mandated a month ago. They have never had the opportunity to discover these facts. They have never had the forum in which to do so. They have a right at this time to a continuance to do reasonable discovery. And I would submit to the Court on its face the affidavit of opposing counsel is absolutely excessive.

We've pointed out some of those items to the Court. We've shown the difference between what was claimed at the time of the decision and suddenly what is claimed in the court today.

And I would submit to the Court an ending thought: Plaintiffs, yes, have not been successful on their appeal. But plaintiffs, as any other litigant, still have a right to a fair and proper proceeding in this court. Is asking for a trial avoiding the issue, or is asking for a trial simply asking for what every other litigant has a right to? I would submit that it's what every other litigant has a right to. Opposing counsel is trying to steamroller the Court with information that the Court will not have analyzed for it, that both parties won't have an opportunity to look at it, where it is opposing counsel asking the Court to make a decision without facts. And really it is astounding that a party would ask the Court not to allow discovery to provide for the fair and impartial determination of the set of facts that are before the Court.

For these reasons we ask in this order, number one, a stay of this proceeding to allow us to proceed to the United States Supreme Court; secondly, a continuance to allow for discovery in this matter ultimately to be tried by a jury; thirdly, if the Court were to rule today, we would submit to the Court that the statute and the Appellate Court who awarded fees in this matter awarded reasonable fees, did not award anything that opposing counsel decided that they could figure out to submit to the Court — awarded only reasonable fees.

We would submit that opposing counsel has failed to demonstrate that the fees proposed are reasonable. In the Court's discretion and particularly for this type of an attempted shenanigan against the Court we believe that the Court should award — that there have been no reasonable fees presented to the Court, and the Court should award no fees whatever for this type of conduct.

Thank you very much.

THE COURT: Okay. Do you have an order? Let me see your order.

MR. STAMBOR: Your Honor, I have two orders here. In fact, let me give a copy to Miss Schiedler-Brown. This is the order enforcing the award of fees. And I also have another order that denies the various alternative delays the plaintiffs have requested and awards terms against them.

THE COURT: What's this extra thousand dollars for?

MR. STAMBOR: For having to respond to these frivolous motions requested on the part of the plaintiffs today.

THE COURT: Okay. This is remanded from the Appellate Court. The only thing we are talking about here is fixing attorney's fees. We've got various motions formulated by plaintiff's counsel here — a motion to stay to the Supreme Court of the United States so they can rule. There's no basis for that. It's denied. A jury demand. There's no basis for that. That's denied. Discovery at this time is denied. There's no basis.

The only thing we are going to — The only determination I have to make is to fix reasonable attorney fees. A thousand dollars — I'm going to strike that out — No. 5. Let's see, you got all your motions. The jury trial is denied, the stay is denied, the continuance is denied. The change of judge is denied. I guess she wants discovery and so forth. That's denied.

All right. I'll sign this.

MS. SCHIEDLER-BROWN: Your Honor, would you insert on page 2 of that particular order on Item No. 3, "Request for continuance in order to obtain discovery" just to clarify?

THE COURT: Write it in, and I'll sign. All right. As to the attorney fees, I see no reason why I shouldn't approve them. I'll approve the attorney fees.

She made a change on that. Go ahead and initial it, and I'll sign it.

Okay. Good luck. There we are.

MR. STAMBOR: Thank you, Your Honor.

THE COURT: Here, you can have your copy back, too.

MS. SCHIEDLER-BROWN: Thank you.

(The hearing in the above-entitled matter was concluded at 9:34 a.m.)

Supreme Court, U.S.
FILED
MAR 29 1994
OFFICE OF THE CLERK

No. 93-1425

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person; LILLIAN YOUNG, a married person; TONI STRAUCH, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times; WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals, Division I, of the State of Washington

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1425

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person; LILLIAN YOUNG, a married person; TONI STRAUCH, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times; WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY and KAREN MCCOY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals, Division I, of the State of Washington

BRIEF IN OPPOSITION

Respondents [1] ask that the Court deny the writ of certiorari petitioners have requested.

[1] Respondent Walla Union-Bulletin, Inc., is a wholly-owned subsidiary of respondent Seattle Times Company. Blethen Corporation, a privately-held corporation, owns 50.5% and Knight-Ridder Investment Co., a company that is affiliated with Knight-Ridder, Inc., a publicly-held corporation, owns 49.5% of the common voting stock of Seattle Times Company.

COUNTER-STATEMENT OF THE CASE

A decade ago this fourteen-year-old lawsuit was the subject of this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). This lawsuit has also been the basis for unsuccessful petitions for certiorari by these same petitioners in 1984 and 1989, who have brought three separate defamation cases against respondents since 1980.[2] In addition to this case, petitioners have filed and maintained many other frivolous lawsuits and appeals against media defendants and others in the federal and state courts of the State of Washington[3] and

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[2] The current Petition for Certiorari ("Pet.") concerns the first lawsuit (hereafter "*Rhinehart I*"). *Rhinehart I* was the subject of the 1984 opinion by this Court, which affirmed the decision by the Washington Supreme Court in *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 22, 654 P.2d 673, 690-91 (1982), *aff'd*, 467 U.S. 20 (1984), and of the two unsuccessful petitions for certiorari that have been filed at five-year intervals by these same petitioners. *See, e.g., Rhinehart v. Seattle Times Co.*, 467 U.S. 1230 (1984); *Rhinehart v. Seattle Times Co.*, 490 U.S. 1015 (1989). The second and third lawsuits (hereafter "*Rhinehart II*" and "*Rhinehart III*", respectively) were commenced in 1982 and 1986, respectively, and were later consolidated by the trial court.

[3] In addition to this case (*Rhinehart I*) petitioners have filed a series of frivolous lawsuits and frivolous appeals in the federal and state courts of Washington.

First, petitioners brought claims in the United States Bankruptcy Court in Seattle against a former Aquarian Foundation member who (as another bankruptcy court observed) had left the fold when he "found questionable the Foundation's practice of passing off cheap jewelry as 'sacred' gems in return for donations ranging anywhere from $25.00 to $1,000.00." *In re Thomas*, 54 B.R. 287, 290 (Bankr. D. Hawaii 1985). The United States Bankruptcy Court in Seattle dismissed those claims because of petitioners' "flagrant and intentional violation of the rules of discovery" and held that petitioners' misconduct, which included Rhinehart's appearance at his deposition dressed in a gorilla costume, was designed to make a "mockery of the Court and of the judicial process." Rejecting petitioners' constitutional attacks, the United States District Court affirmed the decision and the Ninth Circuit dismissed petitioners' appeal. *Herr v. Aquarian Founda-*

tion, Inc., Adv. No. 80-1871 (Bankr. W.D. Wash. Feb. 28, 1984), *aff'd*, No. C84-496V (W.D. Wash. Sept. 7, 1984), *app. dismissed*, No. 84-4369 (9th Cir. Oct. 11, 1985).

Second, petitioners next defied discovery orders in a libel lawsuit that they had filed against a Seattle television station (KIRO), the Tacoma News-Tribune, and others. Petitioners argued their lawsuits were exempt from the normal rules of civil discovery and forced the trial court to dismiss their claims. They appealed and lost in the Washington Court of Appeals (which ruled the arguments "specious" and "without merit"). The Washington Supreme Court and this Court refused review. *Rhinehart v. KIRO, Inc.*, 44 Wash. App. 707, 723 P.2d 22 (1986), *rev. denied*, 108 Wash. 2d 1008, *app. dismissed sub nom., Rhinehart v. Tribune Pub. Co.*, 484 U.S. 805 (1987). In an unpublished decision in a related case, the Washington Court of Appeals affirmed the dismissal of a similar set of claims brought by Rhinehart. *Rhinehart v. Powers*, 45 Wash. App. 1005 (1986).

Third and fourth, between 1985 and 1989, petitioners also resisted discovery orders in a collection action filed by their former attorneys in *Rhinehart I*. Their defiance resulted in a default judgment and an award of sanctions issued by the Washington Court of Appeals and upheld by the Washington Supreme Court and this Court on further review. *Edwards & Barbieri v. Aquarian Foundation*, No. 17405-3-I (Wash. App. Aug. 28, 1986), *rev. denied*, 107 Wash. 2d 1027, *app. dismissed*, 484 U.S. 892 (1987), *reh. denied*, 484 U.S. 1083 (1988). Two years later, in supplemental proceedings, petitioners again refused to comply with discovery, again sustained sanctions, again sought further appellate review, and again lost, with the Washington Court of Appeals imposing sanctions as a consequence of petitioners' frivolous appeal and the Washington Supreme Court and this Court refusing further review. *Aquarian Foundation v. Edwards & Barbieri*, No. 20268-5-I (Wash. App. Nov. 21, 1988), *rev. denied*, 112 Wash. 2d 1003, *cert. denied*, 493 U.S. 813 (1989).

Fifth, petitioners filed a second defamation suit against KIRO and again refused to comply with discovery, which again forced the trial court to dismiss their claims because of their deliberate noncompliance with discovery orders. This decision was again affirmed by the Washington Court of Appeals, which imposed a sanctions award, and was sustained on further appellate review. This Court denied certiorari in 1990. *Rhinehart v. KIRO, Inc.*, No. 22546-4-I (Wash. App. Aug. 8, 1989), *rev. denied*, 113 Wash. 2d 1035, 785 P.2d 825, *cert. denied*, 498 U.S. 850 (1990).

Sixth and Seventh, petitioners commenced two new defamation lawsuits in King County Superior Court against respondents. The

elsewhere.[4] They now complain that the Washington

first (*Rhinehart II*) alleged that the newspaper had defamed petitioners when it published an article about the former Foundation member who was the subject of the Foundation's unsuccessful Bankruptcy Court action that was dismissed after Rhinehart appeared at his deposition dressed in a gorilla costume. The other action (*Rhinehart III*) involved claims of defamation brought by Rhinehart, the Foundation, and Linda Dunn (a Foundation officer) because the newspaper had reported on and quoted from this Court's May 1984 decision upholding the protective order issued in *Rhinehart I*. The trial court dismissed the claims and awarded sanctions in *Rhinehart II* after petitioners repeatedly defied discovery orders. *Rhinehart v Seattle Times*, 15 Med. L. Rep. (BNA) 1510 (Wash. Super. Ct. May 13, 1988). The trial court ruled that the claims in *Rhinehart III* were frivolous and were brought in violation of RCW 4.84.185 (a statute designed to deter frivolous litigation) and Washington Civil Rule 11 and awarded respondents approximately $42,000 in sanctions. *Rhinehart v. Seattle Times*, 15 Med. L. Rep. (BNA) 1509 (Wash. Super. Ct. May 11, 1988). The Washington Court of Appeals affirmed these rulings. *Rhinehart v. Seattle Times, Inc.*, 59 Wash. App. 332, 798 P.2d 1155 (1990) (published ruling); *Rhinehart v. Seattle Times*, 69 Wash. App. 1067 (1993) (unpublished decision).

Eighth, petitioners filed a civil rights action in United States District Court in Seattle against the State of Washington, that enforcement of the Civil Rules violated their claimed constitutional right to pursue frivolous litigation. Because the claims against the State were absolutely barred by the Eleventh Amendment, Chief Judge Barbara J. Rothstein dismissed their action with prejudice, ruled that the claims were frivolous, and imposed sanctions. On February 15, 1994, the United States Court of Appeals for the Ninth Circuit agreed and affirmed her rulings in their entirety. The Ninth Circuit also imposed $1,000 in additional sanctions because the appeal was frivolous, ruling that petitioners had "failed to cite any authority to support the result sought in this case" and rejecting their argument that the Eleventh Amendment immunity issue was "in any way unsettled," given that it "has been consistently rejected for over a hundred years." As the court noted: "we and the Supreme Court have consistently rejected each of Appellants' arguments." *Aquarian Foundation v. Washington State*, 1991 U.S. Dist. LEXIS 16569 (W.D. Wash. Aug. 21, 1991), and 1991 U.S. Dist. LEXIS 16571 (W.D. Wash. Oct. 17, 1991), *aff'd*, 1994 U.S. App. LEXIS 3228 (9th Cir. Feb. 15, 1994).

[4] *See, e.g., Rhinehart v. Stauffer*, 638 F.2d 1169 (9th Cir. 1979) (granting sanctions under Fed. R. Civ. P. 11).

Court of Appeals has ordered them to reimburse respondents for the expenses, including attorneys' fees, that respondents incurred in responding to one of their frivolous appeals.

The facts underlying the Petition are quite simple.[5] Petitioners defied the trial court's discovery orders.[6] The trial court then dismissed their complaint. Petitioners appealed. The Washington Court of Appeals affirmed and remanded for the trial court to calculate the attorneys' fees that petitioners should pay respondents for petitioners' frivolous appeal. Pet. Appendix ("App.") B26. On

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[5] Respondents contest many of the assertions made in petitioners' Statement of the Case. *See* Pet. at 3-6. Among other things, petitioners' assertions that there were "defamatory, untrue articles," that respondents had depicted petitioners "as a bizarre, mind-controlling cult that bilked its members out of personal funds and property," that Aquarian Foundation members "experienced ostracism and violence as a result of the defamatory articles published by Respondents," that "[t]hese acts of violence were documented in the original action," that "[r]espondents had already substantially completed the legal work to respond to the appeal," that Judge Dore did not "allow[] a record to be made," that petitioners' counsel "did not refuse to cross-examine counsel," that "the Court did not provide for the calling of any factual witnesses," and that Judge Dore "again summarily awarded the same unconscionable amount of attorney's fees by simply signing findings submitted by Respondents" are either contrary to or unsupported by the record in this case.

[6] In January 1987, after *Rhinehart I* had been initially remanded to the trial court in Seattle, King County Superior Court Judge James J. Dore dismissed petitioners' claims when they deliberately defied his discovery orders and presented the same recalcitrant arguments that had been rejected in all their prior cases and appeals. In 1988 the Washington Court of Appeals affirmed that dismissal, held that petitioners' appeal was frivolous and that "the issues are devoid of merit with no reasonable possibility of reversal," and ordered the case again remanded to the Superior Court to determine the amount of the sanctions to be imposed upon petitioners. The Washington Supreme Court then denied review, and this Court dismissed the consequent appeal. *Rhinehart v. Seattle Times Co.*, 51 Wash. App. 561, 581-82, 754 P.2d 1243, *rev. denied*, 111 Wash. 2d 1025 (1988), *app. dismissed*, 490 U.S. 1015, *reh. denied*, 490 U.S. 1102 (1989).

December 16, 1988, respondents submitted two affidavits in support of their fee application. The first described the contorted and bizarre history of the appeal. The second, which included detailed timesheets, itemized the fees and expenses respondents had incurred. CP 30-113.[7] On January 5, 1989, petitioners opposed the fee request and offered a barrage of arguments in opposition.[8] CP 118-39, 160-61.

On January 9, 1989, the parties appeared again before Judge Dore of the King County Superior Court. Respondents' counsel, Howard Stambor, argued in support of the fee application. Jean Schiedler-Brown, petitioners' lawyer, argued in opposition.[9] Petitioners sought to delay the proceedings by repeatedly demanding additional discovery of respondents' attorneys and by demanding that a jury determine the amount of the sanctions award.

Judge Dore ruled that there was "no basis" for petitioners' various demands and denied them. CP 162-63, 164; RP 4, 22-23. He also granted respondents' fee application, as documented by their affidavits and time rec-

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[7] References to the Clerk's Papers included in the Washington Court of Appeals record are designated as "CP," references to the Report of Proceedings are designated as "RP," and references to the Supplemental Clerk's Papers generated after the 1990 reference by the Washington Court of Appeals are designated as "SCP."

[8] First, arguing that the fee hearing was "a new action," petitioners suddenly demanded that the trial judge be disqualified from hearing the motion. CP 118-20. Second, petitioners argued they were entitled to a jury trial on the request for fees. CP 114-28. Third, petitioners moved for a continuance to enable them to obtain unspecified discovery "that will provide greater detail on the correlation between the time billed and the time actually spent performing necessary legal tasks." CP 128-31, 137-39, 161. Fourth, they challenged some of the requested fees. CP 131-34.

[9] At the outset of the hearing, Ms. Schiedler-Brown demanded a "chance to cross-examine counsel or do further discovery." At the same time, however, she rejected the invitation to cross-examine respondents' attorneys. RP 8-9, 18.

ords, and awarded them a judgment in the amount of $64,752.02. CP 158-59, 164; RP 22-23.

Petitioners again appealed Judge Dore's decision. On August 13, 1990, the Washington Court of Appeals affirmed all of Judge Dore's rulings except for his determination of the amount of attorneys' fees. Pet. App. A1-A8. Although it retained jurisdiction, the Court of Appeals referred the case back to Judge Dore to supplement the record with more specific findings regarding the basis for the fee award. The Court of Appeals specified that these findings "shall be made from the record as presently constituted, unless the trial judge determines that additional evidence is necessary in order to comply with the principles set forth in this opinion." Pet. App. A7-A8.

On September 10, 1990, Judge Dore held a hearing in which he entered additional findings in support of his 1989 fee award. Prior to that hearing, and in disregard of the instructions of the Washington Court of Appeals, petitioners again sought to burden respondents' attorneys with discovery demands—to which respondents again objected. SCP 1-20, 32-34. Judge Dore thereupon issued findings that described the basis and supported the propriety of the fee award. SCP 21-31.

Petitioners again appealed. The Washington Court of Appeals again affirmed. Pet. App. A10-A11. The court also again denied petitioners' motion for reconsideration. Pet. App. A12. On December 1, 1993, the Washington Supreme Court denied review. Pet. App. A13.

ARGUMENT

This Petition for Certiorari seeks to raise a constitutional challenge to an award of reasonable attorneys' fees prompted by one of petitioners' many frivolous lawsuits and appeals during the past fourteen years. Petitioners do not, however, present any arguments that satisfy the standards of Supreme Court Rule 10.1(b) and (c).

I. PETITIONERS DO NOT POINT TO ANY CONFLICTING DECISIONS BY ANY STATE COURT OF LAST RESORT, BY ANY UNITED STATES COURT OF APPEALS, OR BY THIS COURT.

Despite the requirements imposed by Supreme Court Rules, petitioners do not cite any case from any state court of last resort or from any of the United States Courts of Appeals that decides the federal questions presented in the Petition and conflicts with the Washington Court of Appeals opinion that they seek to challenge here. Nor do petitioners contend that the decision of the Washington Court of Appeals conflicts with any decision of this Court. They assert, rather, that their case presents "a genuine issue of first impression that requires guidance" from this Court. Pet. at 11. Given this record, this is insufficient to satisfy the requirements of Supreme Court Rule 10.1(b) and (c).

II. PETITIONERS DO NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Petitioners seek to raise two federal constitutional arguments. Both are wholly without substance. Neither warrants a grant of certiorari by this Court.

A. Petitioners' Argument That a State's Denial of a Jury Trial for a Sanctions Award Violates the Fourteenth Amendment Is Wholly Without Substance.

Petitioners first argue that the Washington Court of Appeals violated their rights under the Equal Protection

Clause of the Fourteenth Amendment[10] when it determined that there was no right to have a jury determine the amount of a fee award made under Washington Rules of Appellate Procedure ("RAP") 18.7 and 18.9(a) and characterized petitioners' position as "frivolous." Pet. at 9-11; Pet. App. A4-A5. Washington courts, like other American jurisdictions, have long recognized that the power to award fees—particularly fees incurred in responding to a frivolous appeal—is of equitable, not legal, origin.[11]

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[10] The Seventh Amendment's requirement of trial by jury in certain common law civil actions has never been applied by this Court to the States. Petitioners therefore ground their argument in the Fourteenth Amendment, ignoring this Court's ruling that the Fourteenth Amendment "neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure." *Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Indeed, petitioners' theory that the Equal Protection Clause forbids the states from recognizing the historic distinctions between law and equity would go far beyond the requirements of the Seventh Amendment.

[11] This rule is well-established in Washington. "There is no common-law principle that permits a successful litigant to recover from his losing adversary the costs and expenses of the litigation. . . ." *Perlus v. Silver*, 71 Wash. 338, 341, 128 P. 661, 663 (1912). " 'The right to recover attorneys' fees from one's opponent in litigation as part of the costs thereof does not exist at common law.' " *State ex rel. Macri v. City of Bremerton*, 8 Wash. 2d 93, 113, 111 P.2d 612, 917 (1941), *quoting* 14 Am. Jur. "Costs" § 63 at 38 (1938). Thus, fee awards are judicial, not jury, determinations. *See Safeco Ins. Co. of America v. JMG Restaurants, Inc.*, 37 Wash. App. 1, 680 P.2d 409 (1984); RCW 4.84.020 (statute providing that "in all cases . . . in which attorneys' fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable"). Petitioners contention that recovering attorneys' fees on appeal is, in essence, an action on a debt or some form of common law cause of action also has no basis and is contrary to Washington law. *Weiss v. Bruno*, 83 Wash. 2d 911, 914, 523 P.2d 915, 917 (1974) ("the right to award attorneys' fees in limited special situations springs from [the courts'] inherent equitable powers [and the courts] are at liberty to set the boundaries of that power"); *Puget Sound Plywood, Inc. v. Mester*, 86 Wash. 2d

In support of their argument that this Court should grant their Petition, petitioners contend that the traditional concept of "equity" [12] as adopted by the Washington courts (and presumably as recognized by the courts of other states and of the United States) is a "mere fiction" and is "archaic" [13] and should therefore be eliminated by the United States Supreme Court. They assert that Washington State's recognition of the historic distinctions between equity suits and actions at law (a distinction that is also embodied in the Seventh Amendment as applied by the decisions of this Court)[14] is "irrational" and therefore gives rise to a Fourteenth Amendment violation.[15] Pet. at 9, 11.

Even assuming that petitioners had made their Equal Protection argument to the Washington Court of Ap-

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135, 144, 542 P.2d 756, 762 (1975) (an appellate court has "inherent jurisdiction to fix the amount of attorney fees").

[12] A party has a right to a jury trial under Article I, Section 21, of the Washington Constitution only when a legal cause of action is alleged. *Allard v. Pacific National Bank*, 99 Wash. 2d 394, 399, 663 P.2d 104, 108 (1983).

[13] In enforcing its constitutional guaranty to a jury, Washington State applies an "historical standard"—that is, it looks to whether a jury right was afforded in connection with a particular action at the time the Washington State Constitution was adopted in 1889. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 644-45, 771 P.2d 711, 716, 780 P.2d 260 (1989).

[14] This Court follows the same principle that petitioners challenge here. It has recognized and relied on this allegedly "irrational" and "archaic" distinction in applying the Seventh Amendment jury right to proceedings in federal courts. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-47 (1989).

[15] Presumably, this alleged "irrationality" arises from petitioners' inability to perceive the distinction between a collection action filed by an attorney, in which the plaintiff or defendant could demand that a jury determine the amount of the debt (*i.e.*, the amount the client owes the attorney), and a frivolous appeal, where a sanctions award encompasses attorneys' fees. Pet. at 9-11.

peals in a timely manner,[16] the argument is bizarre and without substance. This Court has never held that the Fourteenth Amendment erases the fundamental and historic distinctions between law and equity. Indeed, the Court has itself awarded fees in exercising its inherent powers under Supreme Court Rule 42.2 (and its predecessors) without permitting trial by jury.[17] Other federal and state courts have adopted the same principle in issuing sanctions awards.[18] Given these well-established principles, there is nothing in petitioners' argument about any Equal Protection right to a jury trial that requires any intervention by this Court.

Indeed, there is absolutely nothing "irrational" about abiding by the original intent of a state's constitution makers, who understood and recognized the basic distinctions between law and equity. Thus, the trial court's decision rejecting petitioners' demand for a jury trial does not raise any substantial federal question for this Court's consideration.

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[16] Under applicable Washington law, an argument in an appeal brief that is unsupported by authority need not be considered by the Court of Appeals. Petitioners failed to comply with that basic procedural requirement. Pet. App. A5.

[17] *See, e.g., In re McDonald*, 489 U.S. 180 (1989) (per curiam); *Tatum v. Regents of the University of Nebraska-Lincoln*, 462 U.S. 1117 (1983).

[18] *See, e.g., Eisenberg v. University of New Mexico*, 936 F.2d 1131, 1137 (10th Cir. 1991); *Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir. 1987) (rejecting jury right in application for sanctions under Fed. R. Civ. P. 11); *Watson v. Maier*, 64 Wash. App. 889, 899-90, 827 P.2d 311, 317 ("[t]here is also no entitlement to a jury trial on CR 11 allegations of attorney misconduct, even though a factual determination is involved"), *rev. denied*, 120 Wash. 2d 1015, 844 P.2d 436 (1992).

B. There Is No Basis for Petitioners' Argument That Judge Dore Violated Due Process or Equal Protection When He Denied Unnecessary Discovery.

Petitioners' second federal claim is that the Fourteenth Amendment entitled them to additional discovery relating to the fee award respondents had requested. They assert that Judge Dore's denial of this demand for discovery violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pet. at 12-17. What petitioners fail to note, however, is that when they requested the discovery in January 1989, respondents' attorneys had already produced their time records *and*, at the hearing, offered to be examined under oath regarding the fee request.[19] Petitioners, however, refused the offer.

Given these circumstances, discovery would have been productive of nothing but additional delay and additional harassment.[20] As the Washington Court of Appeals stated: "Allowing discovery would have only served to further delay the proceeding." Pet. App. A4. Petitioners had everything they needed to challenge the fee request.[21]

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[19] As the Washington Court of Appeals noted: "Respondents' counsel presented detailed time sheets and was available to appellants for questioning under oath." Pet. App. A4. In the Appendix to their Petition, petitioners included certain portions of the verbatim report of proceedings (Petition App. D9-D15) from that hearing but omit those portions that show that respondents' attorneys offered to be cross-examined and that petitioners' lawyer refused the invitation.

[20] Petitioners' continuing effort to prolong this dispute and resist respondents' right to fees with two separate appeals since the Washington Court of Appeals issued its sanctions award in 1988—almost six years ago—is in defiance of this Court's warning that "[a] request for attorneys' fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

[21] Indeed, due process in these circumstances required only notice and a hearing. *See, e.g., Donaldson v. Clark*, 819 F.2d at 1558-61; *Watson v. Maier*, 64 Wash. App. at 900, 927 P.2d 316-17 (affirming denial of discovery in connection with sanctions award and holding that "due process . . . does not necessarily mean that an attorney

Judge Dore's decision to deny petitioners' demand for additional, and apparently unnecessary, discovery is not a matter requiring intervention by this Court. As this Court noted a decade ago in this very case, "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36. Here, the Washintgon trial court has ruled and the Washington Court of Appeals has affirmed that the decision to deny unnecessary discovery was not an abuse of discretion. Pet. App. A4. When it rejected an earlier constitutional challenge relating to the scope of discovery in this case, this Court stated that "[i]t is sufficient . . . that the highest court in the State found no abuse of discretion in the trial court's decision. . . ." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 37.

Certainly, there was no abuse of discretion here. The trial court's decision about the scope of discovery for a sanctions award does not raise any substantial federal question for this Court's consideration.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for Certiorari.

Respectfully submitted,

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Dated: March 29, 1994

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is entitled to a full evidentiary hearing on CR 11 sanctions . . . the court should limit the scope of sanctions proceedings to the record").